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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 105.

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CHARLES F. GALE, AS RECEIVER OF THE ELMIRA NATIONAL BANK, PLAINTIFF IN ERROR,

*vs.*

THE CHASE NATIONAL BANK.

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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(18,177.)

# (18,177.)

# SUPREME COURT OF THE UNITED STATES

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United States Circuit Court of Appeals for the Second Circuit.

CHARLES F. GALE, as Receiver of the Elmira National Bank,
Plaintiff in Error,
*vs.*
THE CHASE NATIONAL BANK, Defendant in Error.

*Transcript of Record.*

Error to the circuit court of the United States for the southern district of New York.

[Stamped:] United States circuit court of appeals, second circuit. Filed Feb. 28, 1901. William Parkin, clerk.

United States of America, ss.: 1

THE PRESIDENT OF THE UNITED STATES OF AMERICA

TO THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between CHARLES F. GALE, as Receiver of the 2
Elmira National Bank, plaintiff, and the CHASE NATIONAL BANK, defendant, a manifest error hath happened, to the great damage of the said Charles F. Gale as Receiver of the Elmira National Bank, plaintiff, as is said and appears by his complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the 3
United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 18th day of February, 1901, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Sec-

ond Circuit may cause further to be done therein, to correct that error, what of right, and according to the law and custom of the United States, ought to be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 1st day of February, in the year of our Lord one thousand nine hundred and one, and of the independence of the United States the one hundred and twenty-fifth.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the
[L. S.] United States of America for
the Southern District of New
York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE,
*U. S. C. J.*

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to 136, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of Charles F. Gale, as Receiver of the Elmira National Bank, plaintiff in error, against Chase National Bank, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this eighteenth day of February, in the year of our Lord one thousand nine

hundred and one, and of the independence of the United States the one hundred and twenty-fifth. 7

JOHN A. SHIELDS,
Clerk.

[SEAL.]
(Stamp.)

(Endorsed)—The U. S. Circuit Court of Appeals for the Second Circuit.—Charles F. Gale as Receiver of the Elmira National Bank, Plaintiff in Error, *vs.* The Chase National Bank, Defendant in Error.—Writ of Error.—Goodrich, Whitney & Hagen, Attorneys for Plaintiff in Error, 59 Wall Street, New York City.—Service of a copy of the within Writ of Error is hereby admitted this fourth day of Feb., 1901, and citation is hereby waived. Reed, Simpson, Thacher & Barnum, Attorneys for Defendant in Error.— 8
U. S. Circuit Court.—Filed Feb. 4, 1901.—John A. Shields, Clerk.

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UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CHARLES F. GALE, as Receiver of the Elmira National Bank,

AGAINST

CHASE NATIONAL BANK. 9

TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against

10 you by default for the relief demanded in the complaint.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, at the Borough of Manhattan, in the City of New York, this 12th day of July, in the year one thousand nine hundred eight.

JOHN A. SHIELDS,
[L. S.] Clerk.

GOODRICH, WHITNEY & HAGEN,
Plaintiff's Attorneys.
Office and Post Office address,
59 Wall St.,
Borough of Manhattan,
11 New York City.

(Endorsed)—United States Circuit Court, Southern District of New York.—Charles F. Gale, as Receiver of the Elmira National Bank *vs.* Chase National Bank.—Summons.--Goodrich, Whitney & Hagen, Plaintiff's Attorneys.—The plaintiff directs service of process on the deft.'s Attys. Simpson, Thatcher & Barnum, of 10 Wall St,, N. Y.—Goodrich, Whitney & Hagan, Plff.'s Attys.

I hereby certify that on the 12th day of July, 1898, at the City of New York, in my district, I personally served the within summons upon the within named Chase National Bank by exhibiting to Simpson, Thatcher & Barnum, Attorneys
12 for said Chase National Bank, the within original. and at the same time leaving with them a copy thereof, as per directions hereon of Plaintiff's Attorneys, Goodrich, Whitney & Hagen. William Henkel, U. S. Marshal, S. D. N. Y. Dated New York, July 12, 1898.--U. S. Circuit Court.—Filed Jul. 12, 1898.—John A. Shields, Clerk.

CIRCUIT COURT OF THE UNITED STATES, 13

SOUTHERN DISTRICT OF NEW YORK.

CHARLES F. GALE, as Receiver of the Elmira National Bank,
Plaintiff,

AGAINST

CHASE NATIONAL BANK,
Defendant.

} Complaint.

14

The plaintiff above named complains of the defendant above named, as follows (the allegations of paragraphs 5, 6, 7, 8, 9 and 10 being made upon information and belief):

I.—The plaintiff above named is a citizen and resident of the Northern District of New York, in the State of New York. The defendant is and at all the times hereinafter mentioned has been a national banking association, organized and incorporated under the Revised Statutes of the United States, and carrying on the business of banking in the Southern District of New York. 15

II.—The Elmira National Bank above named was a national banking association organized and incorporated under the Revised Statutes of the United States, and carrying on the banking business at the City of Elmira, in the Northern District of New York, at the times hereinafter mentioned and down to May 23, 1893, when it closed its doors and then and there suspended and discontinued its business and has not since resumed the same.

16 III.—On May 26, 1893, the Comptroller of the Currency of the United States having become satisfied of the insolvency of the said bank did, under the authority of the Revised Statutes of the United States, appoint one Charles Davis, Receiver of said Elmira National Bank, by certificate under his hand and official seal, dated on that day; and said Receiver duly qualified according to law and entered upon the duties of his trust and continued in the discharge of the same until his death on April 14, 1896.

IV.—On May 21, 1896, the Comptroller of the Currency of the United States did, under the authority
17 of the Revised Statutes of the United States, appoint this plaintiff Receiver of said Elmira National Bank, by certificate under his hand and official seal, dated on said day, and this plaintiff thereupon duly qualified according to law and entered upon the duties of his trust and has since continued in the discharge of the same.

V.—Prior to its suspension, as aforesaid, the Elmira National Bank had a bank account with this defendant, depositing large amounts of currency, checks and other negotiable paper with the defendant and drawing against the same. It was agreed between said banks that interest should be allowed
18 upon the balance of this account from day to day in whose favor soever the daily balance should be, at the rate of 6 per cent. per annum.

VI.—On May 5, 1893, one J. J. Bush was the cashier of the Elmira National Bank.

I.—On or about February 14, 1891, said Bush had given to defendant his promissory note in writing, payable to defendant on demand, for the sum of $25,000; and on said May 5, 1893, he was still indebted thereon to the defendant in the sum of $15,000 principal and $12.50 interest.

VIII.—On said May 5, 1893, the account of said Bush in Elmira National Bank was overdrawn, and he was indebted to said bank by reason of such overdraft, and was without authority to accept or certify any check on said bank in his own favor.

IX.—On said May 5, 1893, at the office of defendant in the City of New York, said Bush signed a check in the following words, to wit.:

"New York, May 5, 1893.

"Elmira National Bank, Elmira, N. Y.
"Pay to the order of the Chase National
"Bank Fifteen thousand twelve and $\frac{50}{100}$ dol-
"lars, $15,012.50.
"To.....

"(Signed) J. J. Bush."

He thereupon also at said office signed the following statement written across the face of said check, to wit.:

"Certified and accepted, May 5, 1893,
"Payable at Chase National Bank, New York.
"Elmira National Bank, by J. J. Bush,
"Cashier."

He thereupon also at said office delivered said check to the defendant by one W. H. Porter, its vice-president. All the words quoted aforesaid had been written by said Porter except the signatures "J. J. Bush" and "J. J. Bush, Cashier"; and the making and delivery of said check had been suggested by said Porter on behalf of defendant as a means of liquidating Bush's said indebtedness. Forthwith after the delivery of said check the amount thereof was charged by defendant to the account of the Elmira National Bank, and said amount was thereupon and thereafter retained by defendant to its own use out of the moneys of said Elmira National Bank in its possession; and the interest payments by the Elmira National Bank to defendant were thereby from said day increased at the rate of six per centum per annum upon the sum of

22 $15,012.50. No notification of the transaction was given by defendant to the Elmira National Bank, and it remained unknown to said bank and its officers and directors, except said Bush, until after the appointment of the first Receiver as aforesaid. No consideration for said $15,012.50 was received by said Elmira National Bank, but said amount was credited by defendant to said Bush as a payment of his said individual indebtedness.

X.—The return of said amount was duly demanded of the defendant by said Davis as Receiver of the Elmira National Bank, on or about July 28, 1893, but no part thereof or of the interest accruing
23 thereon since May 5, 1893, has been paid.

Wherefore, plaintiff demands judgment against the defendant for the sum of $15,012.50, with interest thereon from May 5, 1893.

GOODRICH, WHITNEY & HAGEN,
Plaintiff's Attorneys.

NORTHERN DISTRICT OF NEW YORK, } ss.:
County of Broome, }

CHARLES F. GALE, being duly sworn, says: I am the plaintiff in the above entitled action. The foregoing complaint is true of my own knowledge, except as to the matters stated therein upon information and belief, and as to those matters I believe it
24 to be true.

(Sgd.) CHAS. F. GALE.

Sworn to before me this }
9th day of July, 1898. }
(Sd.) GEORGE W. OSTRANDER,
[NOTARY'S SEAL.] Notary Public.

(Endorsed)—Circuit Court of the U. S., Southern District of New York.—Charles F. Gale, Receiver, Plaintiff, against Chase National Bank, Defendant.—Complaint.—Goodrich, Whitney & Hagen, Plaintiff's Attorneys, 59 Wall Street, New York City.—U. S. Circuit Court.—Filed Jul. 12, 1898.—John A. Shields, Clerk.

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the Post Office Building, in the Borough of Manhattan, City of New York, on the thirty-first day of October, 1899. 25

Present—Hon. WILLIAM K. TOWNSEND,
*District Judge.*

CHARLES F. GALE, as Receiver of the Elmira National Bank, Plaintiff, 26

AGAINST

THE CHASE NATIONAL BANK, Defendant.

Order Amending Complaint.

The above entitled action having come on to be tried upon the issues raised by the complaint and answer, and a motion having been made by the plaintiff before the introduction of any evidence upon the trial to amend the complaint by inserting at the end of paragraph IX. thereof the following 27 words, viz.:

"At the time of the appointment of the first Receiver as aforesaid there remained in the hands of the defendant of the moneys deposited by the Elmira National Bank, a large balance undrawn in addition to said $15,012.50 and interest thereon. Said additional balance was paid to said Receiver, leaving said $15,012.50 and interest still due, payment whereof was refused by the defendant upon demand therefor by said Receiver, and which remains wholly unpaid."

28 Now, on motion of Goodrich, Whitney & Hagen, attorneys for plaintiff, and after hearing Austen G. Fox, of counsel for defendant in opposition thereto, it is

Ordered, that the said amendment be, and the same hereby is allowed, and that the allegations thus inserted in the complaint be deemed to be controverted by the defendant, without prejudice to defendant's objection to the allowance of said amendment, and that this order be made a part of the record of this cause.

Enter November 16, 1899, as of October 31, 1899.

W. K. TOWNSEND,
Judge.

29

(Endorsed)—United States Circuit Court, Southern District of New York.—Charles F. Gale as Receiver of the Elmira National Bank, Plaintiff, against the Chase National Bank, Defendant.—Order.—Goodrich Whitney, & Hagen, Plaintiff's Attorneys, 59 Wall St., New York City.—A copy of the within this day received. November 4, 1899.—Reed, Simpson, Thacher & Barnum, Attorneys for Defendant.—U. S. Circuit Court.—Filed Nov. 16, 1899.—John A. Shields, Clerk.

30

CIRCUIT COURT OF THE UNITED STATES, 31

SOUTHERN DISTRICT OF NEW YORK.

CHARLES F. GALE, as Receiver of the Elmira National Bank, Plaintiff,

vs.

CHASE NATIONAL BANK, Defendant.

Answer.

32

Defendant answers the complaint herein as follows:

1. It denies any knowledge or information sufficient to form a belief as to the truth of any of the following allegations of said complaint: The allegations of plaintiff's citizenship and residence, in paragraph "I."; all the allegations of paragraphs "III.," "IV." and "VI."; the allegations of Bush's overdraft and indebtedness, in paragraph "VIII."; the allegation in paragraph "IX.," that "it remained unknown to said bank and its officers and directors except said Bush, until after the appointment of the first Receiver as aforesaid," and that "no consideration for said $15,012.50 was received by said Elmira National Bank"; and the allegations of demand by Davis, in paragraph "X." 33

2. It denies, on information and belief, the allegation as to Bush's authority, in paragraph "VIII." of said complaint, and in respect to the allegations of paragraph "IX." thereof denies that "the making and delivery of said check had been suggested by said Porter on behalf of de-

fendant as a means of liquidating Bush's said indebtedness," except in connection with a tender then made by Bush, in payment of his indebtedness of currency, and a draft aggregating said amount and apparently belonging to him, and denies that forthwith after the delivery of said check, the amount thereof was charged by the defendant to the account of the Elmira National Bank," except as an offset to the credit thereupon written in said account of the aforesaid currency and draft which were not so credited as belonging to said Elmira National Bank, or received from it or for its account, but solely as against and to make good the charge aforesaid, said check, charge and credit, as one transaction, being employed to apply the said currency and draft to the payment of said indebtedness for which they were tendered; and denies every allegation of said paragraph "IX." after the one last above quoted not hereinbefore expressly controverted.

Wherefore, defendant asks judgment dismissing the complaint, with costs.

SIMPSON, THACHER & BARNUM,
Attorneys for Defendant.
Office and Post Office address,
10 Wall Street,
New York City.

SOUTHERN DISTRICT OF NEW YORK, } ss.:
County of New York, }

WILLIAM H. PORTER, being duly sworn, says: I am the vice-president of the Chase National Bank, the defendant in the above entitled action; the foregoing answer is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those mat-

ters I believe it to be true. This verification is not made by the defendant because it is a corporation. 37

WM. H. PORTER.

Sworn to before me this 9th day of September, 1898.

SAMUEL H. JARVIS, Jr.,
Notary Public,
New York County.

(Endorsed)— Circuit Court of the U. S., Southern District of New York.—Charles F. Gale, Receiver, *vs.* Chase National Bank.—Answer.—Simpson, Thacher & Barnum, Attorneys for Defendant, 10 Wall St., New York.—Service of a copy of the within answer is hereby admitted this 9th day of September, 1898. Goodrich, Whitney & Hagen, Attys. for Plff.—U. S. Circuit Court.—Filed Nov. 9, 1899.—John A. Shields, Clerk. 38

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CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

CHARLES F. GALE, as Receiver of the Elmira National Bank,
Plaintiff, 39

AGAINST

CHASE NATIONAL BANK,
Defendant.

The undersigned, Chase National Bank, the defendant herein, and Simpson, Thacher & Barnum, attorneys for said defendant, hereby consent to the substitution of Reed, Simpson, Thacher & Barnum

as attorneys for said defendant herein, in place of Simpson, Thacher & Barnum.

Dated October , 1899.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,
By A. B. HEPBURN,
Vice-President.
SIMPSON, THACHER & BARNUM,
Defendant's Attorneys.

(Endorsed)—U. S. Circuit Court, Southern District of New York.—Charles F. Gale, Receiver, *vs.* Chase National Bank.—Consent and Rule of Substitution.—Reed, Simpson, Thacher & Barnum, Attorneys for Deft., 10 Wall Street, New York.—U. S. Circuit Court.—Filed Oct. 10, 1899.—John A. Shields, Clerk.

13822

43 At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the Post Office Building, in the Borough of Manhattan, City of New York, on the 22d day of October, 1900.

Present—Hon. NATHANIEL SHIPMAN,
*Circuit Judge.*

44 CHARLES F. GALE, as Receiver of the Elmira National Bank,
Plaintiff,

AGAINST

THE CHASE NATIONAL BANK,
Defendant.

The above entitled action having come on to be tried upon the issues raised by the complaint and answer, and a motion having been made by the defendant before the introduction of any evidence upon the trial, to amend the answer by inserting the following additional paragraph, to wit: 45

"The defendant further alleges upon information and belief, that before the commencment of this action, and in and by a final judgment on the merits in an action between Charles Davis, mentioned in the complaint herein, as Receiver of the Elmira National Bank, as plaintiff, and this defendant, as defendant, in the Supreme Court of the State of New York for the County of Chemung, it was adjudged and determined that the defendant did not wrongfully and illegally charge on its books the Elmira National Bank with the amount of the check $15,012.50 men-

46 tioned in the complaint herein, and that the defendant did not illegally, wrongfully or fraudulently use or apply the funds of the Elmira National Bank to the payment of said check, and did not retain the amount of said check to its own use out of moneys of the Elmira National Bank in its possession; that said Davis was the predecessor in office of the complainant herein as Receiver of the Elmira National Bank, and said judgment is final and conclusive upon it."

Now, on motion of Reed, Simpson, Thacher & Barnum, attorneys for defendant, and after hearing Edward B. Whitney, of counsel for plaintiff, in op-
47 position thereto, it is

Ordered, that the said amendment be, and the same hereby is, allowed and deemed to be made, and that this order be made a part of the record of this case.

Enter as of October 22, 1900.

N. SHIPMAN,
Circuit Judge.

(Endorsed)—U. S. Circuit Court, Southern District of N. Y.—Charles F. Gale, as Receiver of the Elmira National Bank, against The Chase National Bank.—Order Amending Answer.—Reed, Simpson, Thacher & Barnum, Attorneys for defendants, 10 Wall Street, New York.—U. S. Circuit Court.—Filed Jan. 26, 1900.—John A.
48 Shields, Clerk.

At a Stated Term of the Circuit Court 49
of the United States of America for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the Borough of Manhattan, in the City of New York, on Monday, the 22d day of October, in the year of our Lord one thousand nine hundred.

Present—The Honorable NATHANIEL SHIPMAN,
*Circuit Judge.*

CHARLES F. GALE, as Receiver of the Elmira National Bank, 50

vs.

CHASE NATIONAL BANK.

Now comes the plaintiff, by Edward C. Whitney, Esq., his attorney, and moves the trial of this cause. Likewise comes the defendant, by Austen G. Fox, Esq., its attorney. Thereupon a jury is impanelled and the cause proceeds to trial. After hearing the evidence for the respective parties, the argument of counsel and the charge of the Court, the jury, on 51
Friday October 26, 1900, retire in charge of an officer duly qualified to attend them, and upon their return say they find a verdict for the plaintiff for $12.50, with interest at 6 per cent. from May 5, 1893. Stay of 60 days to prepare a bill of exceptions.

(An extract from the Minutes.)

JOHN A. SHIELDS,
Clerk.

[SEAL.]

52 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CHARLES F. GALE, as Receiver of the Elmira National Bank, Plaintiff,

AGAINST

THE CHASE NATIONAL BANK, Defendant.

53 The issues in this cause having on the 22nd day of October, 1900, come on to be tried before the Honorable Nathaniel Shipman, United States Circuit Judge, and a jury, and the jury having on the 26th day of October, 1900, rendered a verdict in favor of the plaintiff and against the defendant for the sum of twelve dollars and fifty cents, with interest at six per cent. from May 5th, 1893, it is hereby ordered and adjudged, that the plaintiff, Charles F. Gale, as Receiver of the Elmira National Bank, recover from the defendant, the Chase National Bank, the sum of twelve dollars and fifty cents, and the further sum of five dollars and sixty cents interest, amounting in all to the sum of
54 eighteen and $\frac{10}{100}$ dollars ($18.10) and that plaintiff have execution therefor.

Judgment signed and entered this 29th day of January, 1901, at 3.30 o'clock, P. M.

JOHN A. SHIELDS,
Clerk.

(Endorsed)—United States Circuit Court, Southern District of New York. — Charles F. Gale, as Receiver of the Elmira National Bank, Plaintiff, against Chase National Bank, Defendant. — Judgment — Goodrich, Whitney & Hagen, Attys. for Plaintiff, 59 Wall St., New York City.—U. S. Circuit Court.—Filed Jan. 29, 1901.—John A. Shields, Clerk.

# United States Circuit Court,

SOUTHERN DISTRICT OF NEW YORK.

CHARLES F. GALE, as Receiver of the Elmira National Bank, Plaintiff,

AGAINST

THE CHASE NATIONAL BANK, Defendant.

Bill of Exceptions.

Be it remembered, that at a Stated Term of this Court, held at the United States Court rooms in the Post Office Building, in the Borough of Manhattan, City of New York, on Monday, October 22, 1900, before the Honorable Nathaniel Shipman, Circuit Judge, and a jury duly empanelled and sworn, the above entitled cause was duly tried, and that upon the trial of said cause the plaintiff duly took exceptions to rulings upon the admission of evidence and upon plaintiff's motions to direct a verdict, and to instructions by the Court to the jury, and to the refusal of the Court to grant instructions duly prayed by the plaintiff, as is hereinafter in this bill of exceptions duly set forth.

APPEARANCES:

EDWARD B. WHITNEY, of Counsel for Plaintiff.
AUSTEN G. FOX and ALFRED B. THACHER, of Counsel for Defendant.

The following contains all of the evidence and proceedings on the trial which are material to the consideration of plaintiff's exceptions.

It was admitted by both parties that Charles Davis was appointed Receiver, as alleged in the complaint; that he thereafter died; and that the present plaintiff was appointed Receiver in his stead, and has full capacity to maintain this action.

Plaintiff introduced in evidence a letter of W. H. Porter, Vice-President of the Chase National Bank, to Charles Davis, Receiver of the Elmira National Bank, dated June 6, 1893, enclosing the account current between said banks for the month of May, 1893.

Marked Exhibit A.

Plaintiff introduced in evidence said account.

Marked Exhibit B.

Said account is the Chase National Bank's statement of the account of the Elmira National Bank as a depositor in the Chase National Bank. It contains numerous items on both sides of the account, and among them the following:

As a charge against the Elmira National Bank on May 5, 1893, "Dft. $15,012.50"; as a credit to the Elmira National Bank on May 5, 1893, "Currency, $8,000"; as a credit to the Elmira National Bank on May 8, 1893, "Phila. ck., $7,000." Said account shows a final balance of $20,312.88 in favor of the Elmira National Bank.

Plaintiff introduced in evidence the $15,012.50 certified check, which is fully described in the complaint herein.

Marked Exhibit C.

Plaintiff introduced in evidence certain correspondence and pleadings which were held by the Court to be *prima facie* proof of a demand and refusal, as alleged in the complaint.

Marked Exhibits E to O inclusive.

Plaintiff conceded that the balance of $20,312.88 appearing on the account current (Exhibit B), had

been paid by the Chase National Bank to the Receiver of the Elmira National Bank about August, 1893. Plaintiff's counsel holding in his hand the check, said: "I tender to my friends the check for $15,012.50, inasmuch as we repudiated the transaction." Defendant's counsel made no response.

CHARLES F. GALE, the plaintiff, testified on his own behalf that he was the Receiver of the Elmira National Bank; that he had been assistant to the former Receiver, Mr. Davis; that the bank failed May 23, 1893; that he went there as clerk May 31, 1893, and was there when the account current Exhibit B was sent in by the Chase National Bank; that the $15,012.50 certified check Exhibit C was transmitted by the Chase National Bank to the Receiver with said account.

On cross-examination Mr. Gale testified that he first came officially into possession of any of the papers of the bank about June 2, 1893, as clerk for Mr. Davis as Receiver. He identified on said account Exhibit B, the three entries above referred to, and testified that he checked up the account as clerk for his predecessor, Mr. Davis; that the $7,000 and $8,000 entries would balance the $15,012.50 entry, with the exception of $12.50; that anybody would know this. It is a simple matter of figures.

[PLAINTIFF RESTS.]

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WILLIAM H. PORTER, a witness for the defendant, testified as follows: I reside in the City of New York, and have been vice-president of the Chemical Bank since January 1, 1899. Before that I was vice-president of the Chase National Bank from November, 1892, and prior to that, was the cashier of the Chase Bank. I was connected with the Chase Bank about twelve years. I know J. J. Bush, who was formerly cashier of the Elmira National Bank, of Elmira,

New York. I knew him when he was cashier of that bank. My bank held in May, 1893, a certain note made by Mr. Bush. It had been for $25,000 originally. There had been two payments of $5,000 each made by Mr. Bush on that note theretofore.

On the afternoon of May 4, 1893, I rang up Mr. Bush on the telephone and referred to the financial conditions prevailing and referred to his personal note, which was secured by bank stock, and which had been originally taken as an exception to our general rule in the bank, which was that we did not lend on bank stock, and told him that bank stocks were no longer satisfactory to our directors as collateral; that by the terms of his note we could call upon him at any time to substitute other collateral. I asked him to substitute other collateral, or send us additional collateral. He replied that he would pay off that loan the next morning. He was in my office when I reached the bank the next morning. About nine o'clock.

Q. Can you give the substance of what took place between Mr. Bush and yourself at that time?

Mr. Whitney: That is objected to as incompetent. Anything that Mr. Bush said in the conversation with Mr. Porter, having come down for the purpose of paying off his loan individually, cannot bind the Elmira National Bank.

Objection overruled. Exception by plaintiff.

A. Yes, I can.

Q. Please give it?

A. Mr. Bush was in the president's private office in the bank when I arrived. He had a little satchel there with him on the table. He greeted me and referred to the telephone conversation of the previous day, and stated that he had come down to pay off the loan. He opened the satchel and took out of it a package of currency, $8,000, and a cashier's check or draft of the Elmira National

Bank, signed by him as cashier on the Quaker City National Bank.

It was for the purpose of paying off his note. I declined to take a check on Philadelphia as cash in payment of a note, which by its terms was payable in the City of New York. As a bank officer, Mr. Bush appreciated, as I did, the situation in Philadelphia, which was more acute on account of the panic than anywhere else in the United States, not excepting New York, and it was impossible to get money or returns for checks on Philadelphia. His bank had this money deposited in Philadelphia. He was anxious to use it, and to get his money out of Philadelphia, if possible, and he asked me if I could make a suggestion as to how this could be done. I told him that I did not know of any way unless, if he kept a personal account with the Elmira National Bank, which he said he did, he drew his personal check on the Elmira Bank for the amount of this loan, $15,000, and the interest which was due for four or five days, and accept that check as cashier of the bank, making it payable at the Chase National Bank at New York, which was New York funds, and would be available to pay a note payable in New York City, and to let that $15,000 be deposited to the credit of his bank, the Elmira Bank, the $8,000 of currency and the $7,000 check. He said that was acceptable to him. The check was drawn, the $15,000, and the five days' interest, $12.50, and signed by Mr. Bush, accepted and certified and made payable at the Chase National Bank, as we had arranged. I rang for the discount clerk, Mr. Voorhees, who brought in the note and collateral, and he stood there and he gave the $15,000 check to Mr. Voorhees, gave him the $8,000 in currency and the $7,000 check, and he took the papers all away and the $15,012.50 check was charged up. I instructed Mr. Voorhees to have the $15,012.50 check charged up to the Elmira Bank's account and to have that currency and the $7,000

check credited to their account, and Mr. Voorhees took the papers away with him. I did not follow him. Mr. Bush said he was going to Philadelphia from here and was in a great rush, and he asked if he could leave his collateral for a few days, and I told him he could. I instructed Mr. Voorhees to have the stock put away in a special deposit for safe keeping in the vault subject to Mr. Bush's order. I kept it at his request.

Q. (Showing witness the entry of "Dft. $15,012.50" on the account current, Exhibit B.) This is the original entry made by the Chase National Bank to the Elmira Bank?

A. The monthly account current.

Q. Will you point out on this monthly account current, Exhibit B, the entry of the two items to which you have referred, covering the $8,000 and the $7,000?

A. The statement shows on the 5th of May a credit of currency of $8,000.

That is the $8,000 to which I testified. On May 8, which was as soon as we could hear from Philadelphia by mail, it showed a credit of $7,000 against this Philadelphia check. Those are the two items which offset the debit of the draft, except the $12.50.

After Mr. Bush's note had been reduced to $15,000, he had paid interest on the loan of $15,000 from month to month. I don't recollect in what form interest payments were made. I was familiar with the system employed by the Chase National Bank in keeping its accounts. There was an account current between the Elmira Bank and the Chase Bank for several years prior to 1893. The payments of principal and interest on individual loans were kept in a book separate from the book which contained a statement of the account current.

The Quaker City $7,000 draft, above referred to, was introduced in evidence and marked Exhibit No. 1. It is as follows:

## Exhibit No. 1.

" No. 13 PHILADELPHIA, May 4th, 1893.

" THE QUAKER CITY NATIONAL BANK

" Pay to the order of J. J. Bush Cashier.....

" Seven Thousand.....100 Dollars.

" $7,000. J. J. BUSH.

" Cashier."

Stamped across the face:

" Paid

" May 6, 1893

" The Quaker City Nat'l Bank,

" Philadelphia."

Endorsed:

1st:

" For deposit in

" Chase National Bank

" to credit of

" J. J. BUSH

" Cashier."

2d: (stamped)

" Pay First Nat. Bank,

" Philadelphia, Pa.

" or order for collection and

" remittance of proceeds to the

" Chase National Bank,

" 5 New York

" J. T. MILLS, Jr., Cashier."

J. J. Bush's individual promissory note for $25,000, dated February 14, 1891, payable on demand to the order of and at the Chase National Bank, was produced by the defendant from the papers in its possession, and was introduced in evidence and marked Exhibit No. 2.

The witness further testified as follows:

Mr. Bush never up to the time I severed my connection with the Chase National Bank called for the collateral to his note or demanded it. It remained as a special deposit subject to his order. The note was put away with the stock.

When Mr. Bush presented the Quaker City $7,000 draft (Ex. No. 1) to me it was drawn to the order of J. J. Bush. The word "Cashier," following the name of the payee, was not written there. After it had been decided to have this transaction passed through the account of the Elmira National Bank Mr. Bush endorsed his check "For deposit in the Chase National Bank to the credit of" and signed "J. J. Bush, Cashier," because he was the cashier of the bank; and, having done that, he noticed that it was drawn to his personal order and endorsed as cashier, and, instead of indorsing it personally above this cashier endorsement, he wrote the word "Cashier" on the face of the draft to make it correspond with the endorsement which he had already made. This was done in my presence as a part of the original transaction, as I recollect it.

Q. Now, at the time that Mr. Bush delivered you this check, or draft, on the Quaker City Bank to his own order individually, did you believe it was his own draft, that he could use in his own business?

A. I did.

Q. With regard to the $8,000 currency, did you believe that was his own money which he could use in payment of his debts?

A. I certainly did.

CROSS-EXAMINATION:

I am thirty-nine years old. The Chase National Bank had under me one paying teller, one receiving teller and a corps of 100 men, all told; it had a very large number of correspondents among the country banks. The drafts from the corresponding banks were not all examined by me personally. I have seen drafts on the Chase National Bank or other banks signed by Mr. Bush before this Quaker City draft, Exhibit No. 1. I cannot tell you just how long before, but I have seen a great many of them, because it was my custom to look over the different drafts drawn by our correspondents every day, and particularly large drafts. By large drafts I mean as to those drawn to other banks on New York, $5,000 and upwards; those drawn to ourselves, or remitted to us for account of third parties, I saw all of them, no matter what the size of them was. I had been acquainted with Mr. Bush for some time at that time. We never had any personal transactions with him, except this loan. I had known him for some time at that time. I have testified previously in this litigation. When I testified in Elmira in the case brought by Mr. Davis I was still vice-president of the Chase National Bank. I had only one interview with him on May 5, 1893. I should say that it was not more than fifteen minutes long. Those present were Mr. Bush and myself, and toward the end of the conversation Mr. Voorhees, who came in and attended to the details. He took my orders simply. That conversation took place in the president's office of the Chase Bank. It was brought about by a telephone conversation between Mr. Bush and myself the previous afternoon. I called him up at the Elmira Bank. We both had telephones. I called him up on the long distance phone. By the "financial conditions prevailing" to which I referred in my telephone conversation, I mean what we ordinarily call the panic of 1893. It was a panicky time. The reference to the time was especially

applicable to the character of his collateral. Bank stocks are not usually accepted as collateral by New York banks, but there are exceptions, and this was one of them. When I met him at the Chase National Bank I told him we could not take a check on Philadelphia in payment, or on account of payment, of a note payable in New York. I do not think I said the $8,000 currency could not be received. I did not take the $8,000 currency and credit it on the note, because we arranged this matter as we did for the purpose of simplifying the bookkeeping and to put it all through one transaction. My reasons for refusing the Philadelphia draft were not that the credit of the Philadelphia bank was not good. That was not the point. Our Philadelphia correspondents were several weeks in arrears at that time, and had not paid us the money on checks we had sent there to collect for several weeks. They had put them to our credit, but had not remitted for them, because it was impossible to buy New York funds in Philadelphia. You could not go into a Philadelphia bank and buy a draft on New York for any money. They were four weeks delinquent in remitting. I did not have the Quaker City Bank particularly in mind. I had no objection to the bank at all. I objected to any check on any Philadelphia bank. It would have been the same on any other bank. I was unwilling on May 5, 1893, to take a Philadelphia bank draft and credit it on my books, and allow him to draw against it if it was a large draft. In this case he was going to pay off a loan and the interest on it. I suggested this arrangement as the only way I knew whereby he could use this Philadelphia check. I called in Mr. Voorhees and instructed him to deposit the Philadelphia check for collection to the credit of the Elmira Bank. Collection, in banking parlance, means that an item is not credited until you get the money for it. It is customary to allow the depositor to draw against it. This was a case between two banks where interest was allowed on the balance.

A bank sometimes transfers from its funds in Philadelphia to New York by sending its New York correspondents its own draft on Philadelphia, knowing that the draft cannot be received for two or three days, or perhaps a week, in the regular course of mail, and if the New York bank was to put that Philadelphia check immediately to the credit of the country bank drawing it, it would be paying interest on a piece of paper that would be in transit for a few days to Philadelphia, or a week, and another one coming back here, for two or three days, and would be losing that interest. Therefore, it is the custom among the banks to allow instead the country banks to put in their personal check for collection and to credit the proceeds when they are received, in order not to lose interest, but it is also permissible for that country bank to draw against such drafts in the meantime if they desire.

I never communicated at any time with any of the other directors or officers of the Elmira Bank about Mr. Bush's authority in this transaction, either at the time or afterwards. I made no inquiry of Mr. Bush as to whether he owned the currency or whether it belonged to the Elmira Bank. I made no inquiry of him as to his authority to use this draft for his personal benefit.

He added the word "Cashier" on the $7,000 Quaker City draft in my presence. According to my recollection everything else was on the face of that draft at the time it was first shown me, just as it is now; it was a complete draft for $7,000, signed by J. J. Bush, Cashier, and to the order of J. J. Bush individually. Mr. Bush endorsed it right there, either at the table or over at the signature desk, I have forgotten which. At the same time he signed the $15,012.50 check and signed the acceptance of that check. It was all done at the same time. The addition of the word "Cashier" was made in my presence after the endorsement on the check. I was present and saw the addition made there. I don't know that the addition was at my suggestion. I don't remember

whether I suggested it or whether he noticed it and put it on. It was done. I received it, of course. According to the customs of banking a check payable to the order of J. J. Bush, Cashier (Mr. Bush being Cashier of the Elmira National Bank), is exactly equivalent, I should think, to a check payable to the order of the Elmira National Bank. If the check was credited, it would make it that way to correspond with the endorsement. As a check so deposited in my bank I suppose it was substantially a check to the order of the Elmira National Bank and endorsed by the Elmira National Bank. I do not know of anything on that check to apprise the Quaker City National Bank that the check or draft was drawn for the individual benefit of J. J. Bush. If the word "Cashier" had not been added on the face of it, I do not know whether the Quaker City National Bank would or would not have known that it was drawn for the individual interest of J. J. Bush.

When I testified at the trial of the action brought by Mr. Davis about this draft I recalled that there was a change made in it. I had not seen it for three years. The check was produced on the trial, and then it came right back to me what that change was, and I recalled that it was this particular change that was made.

Q. Does not the word "Cashier" opposite the name of the payee of that check appear to you to be in precisely the same ink and written at the same time that the signature "J. J. Bush, Cashier" to that check was written.

A. There is a similarity in the color of the word in the word "cashier," and I know it was written at the same time.

I could not say that it is distinctly a different ink from the ink in the endorsement on the back of the draft. I cannot say that You can use the same ink and blot one and not the other, and they look entirely different in making the two signatures.

Q. Mr. Porter, you say that you personally ex-

amined all of the checks or drafts that were drawn to the order of your bank by all persons?

A. Not exactly that. I looked over all large checks, about $5,000 and upwards, that passed through the bank, no matter whether they were drawn upon or deposited, and then I looked at the checks drawn upon us, it may be to the order of the Chase Bank, or to the order of other banks in the City, to keep run of the business. I look over the current deposits of checks made by our correspondents upon us that were deposited by our dealers as distinct from them. This $75 check was remitted direct to the bank to pay interest. That I would not naturally see. That was an indebtedness to our bank. If it was remitted by the Elmira Bank to the order of the Chase Bank to the credit of some bank in Albany, or elsewhere, then, though it may be less than $5,000, I should probably see it. I would not be apt to see a check payable to the Chase National Bank for an amount less than $200 when simply to pay an item of interest to the Chase National Bank.

Q. You do not recollect that you did actually see any of the checks that Mr. Bush drew for these small amounts?

A. I probably have, some of them; but I have no distinct recollection that I did. I probably did, because I was in and out of the Loan Department looking over the daily receipts. If you want to bind it down to that particular check of April, 1893, I cannot tell.

Q. And the same statement would hold good as to any of the checks that were drawn for $175, or for $150, for interest—you may have seen them, or you may not?

A. Yes. If some of them were drawn to Mr. Bush individually and endorsed over to me they may have been addressed to me and have come to me on my desk. It would not have been part of my duty as vice-president to examine each one of those checks carefully to see how it was drawn.

REDIRECT-EXAMINATION:

At the time of this transaction I had known J. J. Bush I should say somewhere between two and four years. So far as I knew he was a man of good standing and reputation in the community at that time. I had not the slightest reason, so far as I knew, to doubt his right to do what he did on the day in question. He had been highly recommended to the bank as to his integrity and standing in the community. I recalled that at the time he became cashier of the bank he was R. G. Dun & Company's representative in Elmira, and had been for a good many years.

STEPHEN VOORHEES, a witness for the defendant, testified as follows:

I reside at Plainfield, New Jersey. I am New York agent of the Merchants' Bank of Halifax, a Canadian institution. I was connected with the Chase National Bank from September, 1889, to July, 1899. I was discount clerk on May 5, 1893. I was present at a part of the time when Mr. Porter and Mr. Bush were together. I was called by Mr. Porter with an electric button attached to my desk. When I was called for by Mr. Porter, I went into the president's room of the Chase National Bank and found Mr. Bush and Mr. Porter seated at a table in the office, and on the table I saw a satchel that Mr. Bush I had seen before have in his hand, which he had brought in, and also a package of currency, and a check was lying there. As I came in Mr. Porter said to me, "Mr. Bush has come down to pay his loan for $15,000 and he has brought with him $8,000 in currency and a check for $7,000 on Philadelphia, to be used in the payment of that loan. I have explained to Mr. Bush that a check on Philadelphia, owing to the unsettled condition of affairs at present and the stringency which exists, is not available to pay his personal loan, and I have suggested to Mr. Bush that he deposit this

check for $7,000 for collection for account of the Elmira National Bank, and also deposit the currency for the credit of the bank and draw a draft for $15,-012.50 in order to pay the loan and interest." This money and the check were handed to me together with the check which was already drawn of $15,-012,50, and I took the money and the check, as directed, and handed the money to our teller to be credited to the account of the Elmira National Bank, and handed the check to our collection clerk to be entered for collection for account of the Elmira National Bank. I then took the check for $15,012.50, which was signed by Mr. Bush, and handed it to our loan clerk, and told him that that check was to be used in paying the loan of $15,000, the balance due from Mr. Bush.

I had seen Mr. Bush there that morning before Mr. Porter arrived. I had been expecting him. Mr. Porter told me the day before that he had telephoned for him; and it was my custom to get to the bank about 9 o'clock. When I reached there Mr. Bush was seated inside the railing of the bank. I spoke to him and said, "Good morning," and in the course of the conversation he said: "I have come down to pay my loan." I said, "Yes; Mr. Porter told me he had telephoned you." And I said, "I expect Mr. Porter to be here probably about 10 o'clock." The table that was in that room was a large table for use in the directors' room, something the size, perhaps, of the table there; and in the middle of the table there was a large inkstand and at either end were two small inkstands, and there was a supply of pens. I don't recollect whether I saw Mr. Bush write the word "Cashier" on the face of that check. Before I left Mr. Porter said to me that Mr. Bush was on his way to Philadelphia, going over to Philadelphia from the bank, and he wanted to leave the collateral with us, and when he returned he would call and take it with him to Elmira. Mr. Bush did not return and it was left with us and was

not taken away. That was said in Mr. Bush's presence.

CROSS-EXAMINATION:

I have testified on two previous occasions about this matter. I think that the Quaker City $7,000 draft was entirely filled up, including the word "Cashier," before I saw it. I don't recollect whether it was or not. I could not swear positively. I think the $15,012.50 check was also filled up and signed when I first saw it. Mr. Bush's note and collateral remained in the possession of the bank as long as I was connected with it.

The deposition of James J. Bush, taken on behalf of the plaintiff, at Elmira, on October 5, 1900 (at the taking of which Mr. Whitney represented the plaintiff, and Mr. Thacher, the defendant), was read in part by the defendant as follows:

(From the examination by Mr. Whitney.) I was the cashier of the Elmira National Bank at the time of its failure in May, 1893. I remember the transaction of May 5, 1893.

I recognize the book now shown me as the individual deposit ledger of the Elmira National Bank containing the credits and charges against each depositor in that bank. The officers of the Elmira National Bank, who were accustomed to sign drafts of that bank drawn on other banks were the cashier and assistant cashier. The president might sign them at rare intervals, but it was not customary. The assistant cashier was Mr. E. A. P. Smith, now deceased.

(From the examination by Mr. Thacher.) The Elmira National Bank was formed in the fall of 1889, if my memory is right. I assisted Col. David C. Robinson in getting the stock subscribed among some friends of mine, and I took some stock myself and became one of the original directors. I con-

tinued to be a director until the close of the bank, I think.

It is admitted that Mr. Bush was appointed cashier in January, 1890.

I continued as cashier until the failure of the bank, and also as secretary of the Board of Directors. Mr. C. E. Selover continued to be connected with the bank until early in 1891. When he left or resigned as president of the bank, I think Mr. Frank C. Straat did not continue with the bank. I think their stocks were sold simultaneously.

Q. And from that time who were the controlling persons in that bank?

Objected to as immaterial and incompetent. Objection overruled. Exception.

A. Col. D. C. Robinson and Mr. Jackson Richardson. The stock that they were holding and purchased represented a majority of it.

Plaintiff moved to strike out that portion of the answer beginning with the words, "The stock that they were holding," as immaterial and incompetent.

Motion denied. Exception.

Q. The stock that stood in your name, together with that in Mr. D. C. Robinson's name, was a controlling interest in the stock, was it not?

Same objection. Objection overruled. Exception.

A. It was at the last days of the bank very nearly a controlling interest, I should say.

When Mr. Selover left the bank in 1891 Mr. Jackson Richardson succeeded him as president and director, and continued to be president until the close of the bank. Previously he had been vice-president. I think Mr. E. A. P. Smith was not

assistant cashier during the whole of my cashiership. I think there was no assistant cashier who preceded him. I remember that Mr. C. C. Swan was teller. The books will show whether he was assistant cashier. I think he was one of the officers of the bank from its organization. Mr. Smith took up his duties, I should say, in 1892 some time. His duties began when Mr. Swan resigned. Mr. Selover signed cashier's drafts until I came there. He was the only signing officer. After I became cashier I think that I signed them. I mean that he signed them when he was home, and when he was away I signed them. Selover continued as president after I became cashier until about January or February of the following year, when Jackson Richardson was elected president. I think Swan signed as assistant cashier some of the drafts, because at times I was out of the city, but I would want to refer to the book of drafts to refresh my memory as to that. I don't recollect Mr. Richardson's signing such drafts. He had the power to sign, but whether he ever signed or not I don't know. My recollection is that I never saw his name as president at the foot of our drafts.

There has been a previous trial of this action. It took place in New York.

Q. And you attended there was a witness on behalf of the plaintiff?

A. The Government, that is Gale as Receiver of the Elmira National Bank. I think I was subpœnaed. At least I was written to and asked to come. I don't know whether I received a formal subpœna. Elmira is over 200 miles from New York. I testified on the trial of that action.

I think I kept a deposit account in the Elmira National Bank from the time of its organization. In keeping that account it was the practice to write in the bank ledgers the overdraft balances in red ink, so that they appeared readily to the eye in looking through the books of the bank.

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Q. Now, as a matter of fact, did the books of the bank show overdrafts in your account?

Objected to on the ground that it was immaterial whether or not there were overdrafts in his account. Objection overruled. Exception.

A. I should say that the books of the bank showed my account overdrawn from time to time, as it would any other customer's.

Q. I am not asking as to whether the account was actually overdrawn, but as to whether it appeared on the face of the books of the bank that it was overdrawn?

Same objection. Objection overruled. Exception.

A. Yes, sir; the same as any other man's account.

Q. And that apparent overdraft on the books of the bank was very frequent in occurrence in your account?

A. I would not be able to say how frequently, but I should say it was more than once Not very frequently as I understand it. I should want to refer to the books to show that (examining ledger). I find the overdraft January 21, 1893, was $25. The books will show the actual number of times that the account was overdrawn. Books were open to the inspection of all the officers and clerks of the bank.

Q. And was there any attempt to conceal your overdrafts ever made by you?

Same objection. Objection overruled. Exception.

A. No, sir; never. No objection was ever made to my overdrafts.

Q. Mr. Bush, you drew other drafts as cashier of the Elmira National Bank to your own order be-

sides the $7,000 Quaker City draft which has been mentioned, did you not?

Objected to on the following grounds:

1st. As immaterial and incompetent as against the Elmira National Bank.

2d. That it cannot be any evidence of a course of business, because it does not appear that any of them came to the attention of any of the directors of the bank.

3d. That it is no evidence of any course of business because the directors of the bank could not lawfully have given Bush any general power to issue drafts in his own favor for his individual debts.

4th. Because no evidence as to prior drafts to Bush's individual order would justify the draft in question, which is admitted to have been payable to Bush as cashier—that is, to the Elmira National Bank when received by the defendant.

5th. That the defendant was put on notice and inquiry as to the true ownership of the $7,000 draft by this endorsement by Bush as cashier and as it made no inquiry it is not in a position to appeal to any course of business as to drafts to Bush's individual order, were it conceded that such a course of business existed.

6th. That the defendant, by presenting this $7,000 draft for payment to the Philadelphia bank represented to that bank and to the Elmira National Bank that it represented a mere transfer of funds of the Elmira Bank from Philadelphia to New York, and it is estopped to assert the contrary.

7th. On the ground that the whole transaction testified to by Porter was irregular and outside of any course of business and that, therefore, cannot be sustained by any proof as to a course of business,

8th. The only evidence by which the defendant could to any extent be relieved from liabil-

ity to repay the whole amount would be evidence that the $15,000, or some part thereof, was not the property of the Elmira National Bank, and that is neither pleaded or proved.

Plaintiff's counsel stated that this objection was made both to this question and to this entire line of testimony as to drafts drawn by Mr. Bush to his own order prior to the draft of May 5, 1893.

The Court: Naturally all the points were presented on the argument of this case before the Court of Appeals. Now, it seems to me that when Mr. Porter took the $15,000 check he took a check which was certified to by Bush as cashier. He took a check purporting to make the Elmira Bank liable by the certification, but as such certification was a void certification as a matter of law, it created no liability on the part of the Elmira Bank, because a bank cashier has no right to certify his individual check given in payment of his individual debts, and there was no sort of evidence that that course of proceeding had ever been encouraged or ratified by the directors of the Elmira Bank. Now, what I call the question of importance and perhaps one that is not entirely clear, is whether, having taken that, the defendant can in any case interpose a defense to justify the Chase National Bank in retaining the proceeds of the $7,000 Philadelphia check and the $8,000 currency. The Court of Appeals decided against the plaintiff on that point. They may have been wrong, but I have got to carry out the law as it was construed by the Court of Appeals. Therefore the defense which was introduced, to wit, a justification of the bank, the Chase National Bank, in taking the $7,000 Philadelphia draft and the $8,000 in currency was permitted, and upon this trial I cannot reconstrue or alter or attempt to alter the opinion of the Court of Appeals.

Objection overruled. Exception.

A. Yes, sir.

I drew some that were made out to my own order. I drew such drafts as cashier in my own case. I drew some in my own case that were made to my own order.

Q. And also some in your own business that were made out to the person to whom you desired to make payment?

On objection of plaintiff this question was excluded.

Q. All of those drafts regularly came back to the Elmira National Bank, did they not?

A. Yes, sir.

Q. And were kept among its vouchers?

A. Yes, sir.

Q. And unless they were lost they were handed over to the Receiver on the termination of the bank?

A. Yes, sir.

Q. They remained open to the inspection of the clerks and officers of your bank, did they not?

A. They were there in the bank.

Q. And open to the inspection of any director or officer who desired to examine them?

A. Yes, sir.

Q. When those drafts came back they were in the regular course of business inspected by employees of the bank?

On objection by plaintiff this question was excluded.

Q. And persons in the employ of the bank other than yourself?

On plaintiff's objection this question was excluded.

Q. In the case of some of these drafts you gave your check drawn against your account in the Elmira National Bank to pay for them, did you not?

A. Yes, sir.

Q. And these checks were always submitted for

inspection in the course of business to an employee other than yourself?

On objection by plaintiff this question was excluded.

Q. And these checks remained in the custody of the bank for a considerable period before they were delivered to you?

A. Yes, sir.

Q. Was there any attempt, in any of these drafts drawn to your own order or otherwise in your own business, to conceal the fact that you were drawing drafts as cashier in your own favor?

A. No, sir.

Q. Was any objection ever made to your drawing such drafts?

Objected to as immaterial. Objection overruled. Exception.

A. No, sir.

Q. Was any objection ever made to your drawing drafts to your own order?

Same objection, ruling and exception.

A. No, sir.

Q. And none to your drawing other drafts in your own business?

On objection, this question was excluded.

Q. How far back did your practice of drawing such drafts in your own name extend?

A. I would not be able to state, but I should judge from the first time I wanted a draft.

Q. And from that time on whenever you wanted a draft in your own business you drew it?

Objected to as immaterial, and not confined to drafts to his own order. Objection overruled. Exception.

A. Yes, sir.

Q. Just as you would for anybody else?

A. Yes, sir.

Q. Do you know of other officers of the bank drawing drafts in their own favor?

On objection by plaintiff this question was excluded.

Eight drafts of the Elmira National Bank on the Chase National Bank, being drafts subsequently marked Exhibits Nos. 4–11, inclusive, being produced by plaintiff's counsel from among plaintiff's papers and shown to the witness.

These eight drafts were all drafts signed by me as cashier and issued to me by the Elmira National Bank. They were all duly returned to the Elmira National Bank after payment by the bank on which they were drawn, in the regular course of business, and remained among the vouchers in the bank.

Q. Was any objection ever made by any one to the issuing or using of any of these drafts?

Objected to on the same grounds as made to the general question asked Mr. Bush, namely, immaterial, and that not any of these drafts came to the knowledge of the directors of the bank. Objection overruled. Exception.

A. Not that I ever heard of.

Draft No. 6598 I should say that I mailed to the Chase National Bank.

Q. Do you know for what you made that payment to the Chase National Bank?

Objected to as immaterial. Objection overruled. Exception.

A. I don't know of any way of telling what it was for, except it was for a loan they were carrying. I should say that, to the best of my recollection, the draft is connected with my money due them on account of that loan, namely, the same one which was represented by that note upon which $15,000 was due on May 5, 1893.

Check offered in evidence. Objected to on the grounds previously stated, and also on the ground that it is for too trivial an amount to form any precedent for a draft of $7,000. Objection overruled. Exception. Marked Exhibit No. 4.

**Exhibit No. 4.**

" ELMIRA NATIONAL BANK. No. 6598.
"$170. ELMIRA, N. Y., April 2, 1891.
" Pay to the order of J. J. Bush, Esq.....$170 83
" One Hundred Seventy $^{83}$ ----------$^{100}$ Dollars.
" To the Chase National Bank, } J. J. BUSH,
" New York. } " Cashier."

Stamped across the face:
" Paid
" Apr 4 1891
" Chase
" National
" Bank."

Endorsed:
" Pay Chase National
" Bank or order.
" J. J. BUSH."

I endorsed draft No. 9293 to the order of the cashier of the Chase National Bank. I don't know for what purpose, if it was not in connection with that loan. I don't know of any other indebtedness whereby I would be paying him. I think interest payments were called for every thirty or sixty days, along about the first of the month. From the fact that the amount is in cents and odd figures the best of my recollection is that it went to pay interest on the loan that they were carrying for the bank on the stock; this $15,000 loan in question. It was originally $25,000, and reduced by payments to $15,000, I believe.

Draft offered in evidence.
Same objection ruling and exception.
Marked Exhibit No. 5.

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## Exhibit No. 5.

" ELMIRA NATIONAL BANK. No. 9293.
" $129. ELMIRA, N. Y., Aug. 8th, 1891.
" Pay to the order of J. J. Bush.....$129 17
" One Hundred Twenty Nine 17/100 Dollars.
" To the Chase National Bank, } J. J. BUSH,
" New York. } " Cashier."

Stamped across the face:
" Paid
" Aug. 10, 1891
" Chase
" National
" Bank."

Endorsed:
" Pay W. H. Porter,
" Cashier, or order.
" J. J. BUSH."

I know of no business in which draft No. 14,674 could have been given, except for the interest on this loan in question. To the best of my recollection it was for the interest due on that same loan.

Draft offered in evidence.
Same objection, ruling and exception.
Marked Exhibit No. 6.

## Exhibit No. 6.

" ELMIRA NATIONAL BANK. No. 14,674.
" $96. ELMIRA, N. Y., March 8, 1892.
" Pay to the ordar of J. J. Bush.....$96 11
" Ninety Six 11/100 Dollars.
" To the Chase National Bank, } J. J. BUSH,
" New York. } " Cashier."

Stamped across the face:
" Paid
" Mar 9."

Endorsed:
" Pay Chase Natl. Bank
" New York
" J. J. BUSH."

The five remaining drafts identified by the witness as above were then severally offered in evidence Plaintiff objected separately to each draft on the grounds above stated, and also on the ground that it is not connected with anything. In each case the objection was overruled and plaintiff excepted.

These exhibits are as follows:

**Exhibit No. 7.**

" ELMIRA NATIONAL BANK. No. 5925.
" $35. ELMIRA, N. Y., Feby. 17, 1891.
" Pay to the order of J. J. Bush ..... $35 21/100
" Thirty Five 21/100 ..... Dollars.
" To the Chase National Bank, } J. J. Bush,
" New York. } " Cashier."

Stamped across the face:
" Paid
" Feb 20 1891
" Chase
" National
" Bank."

Endorsed:
" Pay John Bennett
" or order.
" J. J. BUSH."
" John Bennett."

(Stamped)
" Pay to The Order Of
" Western National Bank, N. Y.
" For account of
" Chemung Valley Bank,
" Horseheads, N. Y.,
" JOHN BENNETT, Cashier."

(Also stamped):
" Endorsement
" Western
" National
" Bank.
" Guaranteed."

(Also stamped):
" Western National Bank,
" Paid
" New York."

— —

## Exhibit No. 8.

" Elmira National Bank. No. 13316.
" $50. Elmira, N. Y., Jan. 15, 1892. 18
" Pay to the order of J. J. Bush.....$50$^{00}$
" Fifty .....$^{00}$ Dollars.
" To the Chase National Bank, } J. J. Bush,
" New York. } " Cashier."

Stamped across the face:
" Paid
" Jan 19 1892
" Chase
" National
" Bank."
Endorsed:
" J. J. Bush."
(Stamped):
" For deposit in
" Chemical National Bank.
" to the credit of
" Brokaw Brothers.
" Per. J. K. Armstrong."
(Also stamped):
" Endorsement correct
" Jan 18 1892
" Chemical Nat'l Bank."

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## Exhibit No. 9.

" ELMIRA NATIONAL BANK No. 13318.
" $100. ELMIRA, N. Y., Jan. 15, 1892. 18
" Pay to the order of J. J. Bush .....$100$^{00}$
" One Hundred ..... $^{00}$ Dollars.
" To the Chase National Bank } J. J. BUSH,
" New York. } " Cashier."

Stamped across the face:

" Paid
" Jan 22 1892
" Chase
" National
" Bank."

Endorsed:

" J. J. BUSH."

(Stamped):

" Pay
" National Park Bank
" New York
" Or order, for Collection, for Account of
" The Gate City National Bank
" Atlanta, Ga.
" EDW'D S. MCCANDLESS,
" Cashier."

(Also stamped):

" The National Park Bank
" of New York.
" Paid."

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## Exhibit No. 10.

"ELMIRA NATIONAL BANK. No. 14179.
"$30. ELMIRA, N. Y., Feby. 18, 1892.
"Pay to the order of J. J. Bush.....$30$^{00}$
"Thirty.....$^{00}$ Dollars.
"To the Chase National Bank, } J. J. BUSH,
"New York. } "Cashier."

Stamped across the face:

"Paid
"Feb. 26, 1892
"Chase
"National
"Bank."

Endorsed:

"Pay Wm. B. Coffin, Esq.
"or order.
"J. J. BUSH."
"Pay to the order of
"Cit. Nat. Bank.
"Hornellsville, N. Y.
"W. B. COFFIN."

(Stamped):

"Pay Hanover Nat'l Bank,
"New York, or order, for collection and acc't of
"Citizens' National Bank,
"of Hornellsville, N. Y.
"J. E. B. SANTEE, Cashier."

(Also stamped):

"Hanover National Bank.
"Paid
"Feb. 26, 1892.
"New York."

## Exhibit No. 11.

"ELMIRA NATIONAL BANK. No. 16196.
"$5. ELMIRA, N. Y., May 6th, 1892.
"Pay to the order of J. J. Bush ..... $5.00
"Five ..... 100 Dollars.
"To the Chase National Bank, } J. J. BUSH,
"New York. } "Cashier."

Stamped across the face:
"Paid
"May 11 1892
"Chase
"National
"Bank."

Endorsed:
"Pay F. A. Skilton or order
"J. J. BUSH."
"Pay to the order of
"Mrs. George Fullman
"F. A. SKILTON."
"Mrs. G. G. Fullman.
"G. G. Fullman."

(Stamped):
"Pay American Exchange Nat'l Bank,
"New York, or Order, for account of
"The National Bank,
"of Auburn, N. Y.
"E. H. AMY, Pt."

(Also stamped):
"Am. Ex. Natl. Bank,
"Paid
"May 11 1892
"and
"Endorsement guaranteed
"New York."

(From the examination by Mr. Whitney.) When I stated that to the best of my recollection some of these drafts were used for certain purposes, I mean I could not recollect any other purpose for which

they were put. I can't say that I remember any particular draft. I have this recollection, that there was that loan, and that I was paying interest on it, and so far as I can recollect that is what Exhibit Nos. 4, 5 and 6 were used for. I can't say that I recollect any one of these individual drafts. I should say that draft No. 13,318 (Exhibit No. 9), was given for some of the expenses connected with the bank's matters in Georgia. These expenses were incurred for the Elmira National Bank's benefit.

Q. You think that this check of $100 was in some way or other used for the purposes of the Elmira National Bank?

A. Entirely so; yes, sir.

Plaintiff moves to strike out from the evidence said check Exhibit No. 9 as used for the purpose of the Elmira National Bank, and not for the witness' personal benefit. Motion denied. Exception.

Referring to Exhibits Nos. 4, 5 and 6, I recollect that I was making payments at short intervals of interest on the loan at the Chase Bank. I would use drafts of the Elmira National Bank to make such payments. I used such drafts during that period for that purpose.

Witness identifies fifteen drafts of the Elmira National Bank drawn on the Chase National Bank, signed by the witness as cashier, and drawn to the order of the cashier of the Chase National Bank, and states that all of them were returned to the Elmira National Bank after payment, and remained among the vouchers of that bank. Said drafts were of various dates, running from May 4, 1891, to March 3, 1893, and of amounts varying from $75 to $360. Marked Exhibits Nos. 13-27, inclusive, for identification. Said drafts and all evidence concerning their purpose or use were objected to by plaintiff on the ground that they were not drawn to the

order of J. J. Bush individually. Objection sustained.

Questions subsequently put to the witness Lee as to what interest payments on the loan of the Chase Bank to Bush were made, and whether said fifteen drafts, Exhibits Nos. 13 to 27 for identification, were received by the Chase Bank for interest on that loan, on objection by plaintiff, were also excluded.

Witness identifies two drafts of the Elmira National Bank drawn on the Chase National Bank, signed by the witness as cashier, one of them for $4,997.50, drawn to the order of the Importers and Traders' Bank, dated February 21, 1891, and the other for $5,000, drawn to the order of C. E. Selover, dated March 2, 1891, and states that they were signed by him, and returned to the Elmira National Bank in the regular course of business. On objection by plaintiff, questions as to the use of these drafts were excluded, on the ground that they were not drawn to the order of Bush.

Q. Who were the controlling persons in the management of the Elmira National Bank actually?

Objected to as immaterial. Objection overruled. Exception.

A. Mr. Richardson, Mr. Robinson and myself had more to do with the running of this bank than any of the others.

Q. As a matter of fact, was your management of the affairs of the bank interfered with by any one in any way?

Same objection, and also as too general, and asking for conclusions of the witness. Objection overruled. Exception.

A. I think that my management of the affairs of the bank was so generally in accord with the management of the bank that no one interfered with me, either in my conduct, or the way I per-

formed my duties in the bank. It was not a fact that all of those details were practically entrusted to my sole judgment. Our Board of Directors had an Examining Committee to pass on all our loans. We had an Auditing Committee who looked over our books and occasionally lines of loans would be cut down. We had besides myself in the bank's office permanently employed several clerks.

Plaintiff's counsel produces from the papers in the hands of the plaintiff three drafts of the Elmira National Bank, drawn on the National Bank of North America. Said drafts were offered in evidence by defendant. They were objected to as immaterial and not connected with the case.

Objection overruled. Exception. Marked Exhibits Nos. 30, 31 and 32, respectively.

These exhibits are as follows:

## Exhibit No. 30.

" $300[00]  ELMIRA NATIONAL BANK.
" $300.  ELMIRA, N. Y., Oct. 5th, 1892.
" E. N. B.  Pay to the order of J. J. Bush.....
" Three Hundred .....Dollars.
" To the Nat'l Bank of North America, } J. J. BUSH,
" No. 266.  New York, N. Y.  } " Cashier."

Endorsed:
" J. J. Bush."
(Stamped):
" Am. Ex. Nat'l Bank
" New York
" Oct 1892
" Paid
" Endorsement guaranteed."

" Alfred M. Harkness & Co."

(Also stamped):
"Pay American Exchange Nat. Bank,
"New York,
"Or Order for Collection Account of the
"Tradesmen's National Bank,
"Philadelphia.
"Frank G. Rogers,
"Cashier."

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**Exhibit No. 31.**

"$200[00] ELMIRA NATIONAL BANK.
"$200 ELMIRA, N. Y., Oct. 5, 1892.
"E. N. B. Pay to the order of J J. Bush.....
"Two Hundred.....Dollars.
"To the Nat'l Bank of North America, } J. J. BUSH,
"No. 267 New York, N. Y. } "Cashier."

Endorsed (Stamped):
"Am. Ex. Nat'l Bank
"New York
"Oct. 1892
"Paid.
"Endorsement guaranteed."

"J. J. Bush."

"Alfred M. Harkness & Co."
(Also stamped):
"Pay American Exchange Nat. Bank,
"New York,
"Or order for Collection Account of the
"Tradesmen's National Bank
"Philadelphia.
"Frank G. Rogers,
"Cashier."

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## Exhibit No. 32.

" ELMIRA NATIONAL BANK.
" $500^{00}$. ELMIRA, N. Y., Dec. 13th, 1892.
" E. N. B. Pay to the order of J. J. BUSH.....
" Five Hundred.....Dollars.
" To the Nat'l Bank of North
" No. 331. America, } J. J. BUSH,
" New York, N. Y. } " Cashier."

Endorsed:
" J. J. BUSH."
(Stamped):
" E
" First Nat'l Bank, N. Y.
" Dec.
" 22
" 1892
" Paid "
(Also stamped):
" Pay E. Scofield
" Cashier, or order for account of
" First National Bank,
" Marietta, Ga.
" C. S. MCCANDLISH,
" Cashier."

These three drafts were signed and endorsed by me. They were returned to the Elmira National Bank after payment in the due course of business, and remained among the vouchers of that bank.

(From examination by Mr. Whitney.) I believe that the three of them were used in connection with the Southern land litigation. They were used for the benefit of the bank's litigation.

Q. Were they used to cover any expenses or sums which were used for your individual benefit?

A. I believe that they were used in the expenses which went to make up our litigation. That is my best recollection.

(From examination by Mr. Thacher.) I don't think that I ever told the officers of the bank that I had used them. I think they were used in connection with our attorneys, and they knew that we were going there, and we did what was necessary to save our claims in that country. I have no independent recollection of those drafts and am testifying merely from my conclusions from seeing the endorsements, and knowing that we had that litigation there.

(From examination by Mr. Whitney.) Q. What was that litigation, what was it called?

A. The President of the Bank against The Evans Land and Lumber Company of Ellijay, Georgia, not far from Atlanta, I guess.

Plaintiff moves to strike out these three drafts on the ground that it does not appear that they were issued by Mr. Bush for his individual benefit, but on the other hand that they were used for the benefit of the bank. Motion denied. Exception.

Plaintiff admits that the Elmira National Bank had an account with the National Bank of North America at the time those drafts were made.

Plaintiff's counsel produces from among the papers in the hands of the plaintiff a draft of the Elmira National Bank on the Chase National Bank.

Received in evidence. Marked Exhibit No. 33.

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## Exhibit No. 33.

"ELMIRA NATIONAL BANK. No. 23,404.
"$77. ELMIRA, N. Y., Feby. 15th, 1893.
"Pay to the order of J. J. Bush. ....$77 50/100
"Seventy Seven $\frac{50}{100}$ ..... Dollars.
"To the Chase National Bank, } J. J. BUSH,
"New York. } "Cashier."

Stamped across the face:
"Paid
"Feb 16 1893
"Chase
"National
"Bank."

Endorsed:
"Pay J. T. Mills, Jr.,
"Cash or order.
"J. J. BUSH."

(From examination by Mr. Thacher.) This draft was signed and endorsed by me. Mr. Mills was an officer of the Chase Bank. I can only tell in a general way the purpose for which this draft was given to the Chase Bank. I know of no other indebtedness that I would have had with the Chase National Bank, except in connection with that loan, which was finally $15,000. Other payments were due as interest from time to time as often as the Chase Bank called for them. I should say every sixty or ninety days. I think once a month, some of the time. I don't think it was always regular in that respect. In 1893 they became more urgent about that loan.

Plaintiff's counsel produces from among the papers in the hands of the plaintiff, a check and draft, as follows:

## Exhibit No. 35.

"ELMIRA NATIONAL BANK. No. 643.
"$600. ELMIRA, N. Y., March 1, 1893.
"Pay to the order of M. L. Greider, Esq...$600.00
"Six Hundred.....Dollars.
"Hide and Leather National Bank } J. J. BUSH,
"New York. } "Cashier."

Endorsed:
"M. L. Greider."
(Stamped):
"The German American Bank.
"Paid
"Mar. 30, 1893
"New York."
(Also stamped):
"For Collection & Credit to
"First Nat. Bank of Mount Joy, Pa.
"M. M. BRUBAKER, Cashier."
(Also stamped):
"Pay German Amer. Bank, N. Y.
"Or Order for Account of
"Commercial National Bank of Pa.
"Philadelphia.
"E. P. GRAHAM, Cashier."

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## Exhibit No. 36.

"ELMIRA, N. Y., Feby 28, 1893. No....
"ELMIRA NATIONAL BANK.
"Pay to the order of Dft. to order M. L.
"Greider.....$600.00
"Six Hundred.....Dollars
"Hold for present Dft. Hide No. 643.
"J. J. BUSH."

Stamped across the face:
"Elmira National Bank
"Paid
"Apr 5 1893
"Elmira, New York."

It was admitted that the Elmira Bank then had an account with the Hide and Leather Bank of the City of New York.

I signed that check and signed the draft as cashier. The check was given for the draft. The draft was issued for the check. I paid it to Greider in my own private business. It was returned to the Elmira National Bank after payment in the regular course of business, and remained among the vouchers of the bank, as did the check.

Check and draft offered in evidence by defendant. Objected to on the grounds above stated, and on the ground that the draft was not drawn to the order of J. J. Bush and did not indicate on its face that it was drawn in his private business. The objection was held under advisement by the Court, and afterwards overruled. Plaintiff excepted. The draft and check were marked Exhibits Nos. 35 and 36, respectively.

Plaintiff's counsel produces from among the papers in the hands of the plaintiff

**Exhibit No. 38.**

" ELMIRA NATIONAL BANK. No. 24580.
" $500. ELMIRA, N. Y. March 31, 1893.
" Pay to the order of Mutual Life Insurance Co.
" $500$^{00}$ Five Hundred.....$^{00}$ Dollars.
" To the Chase National Bank, } J. J. BUSH,
" New York. } " Cashier."

Stamped across the face:
" Paid
" Apr 3, 1893
" Chase
" National
" Bank."

Endorsed (stamped):
" For deposit in
" American Ex. Nat'l Bank,
" To credit of
" The Mutual Life Ins. Co.
" of New York."

(Also stamped):
" Endorsement
" Guaranteed
" Apr 1 1893
" American Exch. Nat. Bank."

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**Exhibit No. 39.**

" ELMIRA, N. Y. 3/31 1893. No.
" ELMIRA NATIONAL BANK.
" Pay to the order of Dft. to Mutual Life Ins. Co.
" $500^{00}$ Five Hundred.....Dollars.
" J. J. BUSH."

Stamped across the face:
" Elmira National Bank
" Paid
" Apr. 1 1893
" Elmira, New York."

I signed the check and signed the draft as cashier. The check was given to the Elmira National Bank for the draft. The draft was issued against it. The check remained among the vouchers of the Elmira National Bank. The draft was returned to us in the regular course of business after payment and filed among the vouchers of the bank. I believe the check was used by me in my private business. I don't know for what purpose now. It is too large a draft for premium on life insurance. I don't think the Mutual Life Insurance Company had any relations with the Elmira National Bank. It was given in some business other than the business of the Elmira National Bank. It was a draft paid for by me, and drawn at my request. I might have given it to my father, but my check paid for it.

Draft and check offered in evidence by defendant. Same objection. Objection was taken under advisement, and was later overruled. Exception by plaintiff. Draft and check marked Exhibits Nos. 38 and 39, respectively.

Plaintiff's counsel produced from among the papers in the hands of plaintiff, two drafts of Elmira National Bank on the Chase National Bank, signed by J. J. Bush, Cashier, dated March 31, 1893, to the order of H. K. B. Brown (who was a brother of J.

J. Bush): one for $100, and the other for $128.50, and a check dated March 31, 1893, drawn by J. J. Bush on the Elmira National Bank to the order of "dfts. H. K. B. Brown" for $228.50, also a draft of Elmira National Bank on Quaker City National Bank, signed by J. J. Bush, Cashier, dated May 3, 1893, to the order of H. K. B. Brown for $100, and a check dated May 3, 1893, drawn by J. J. Bush on the Elmira National Bank to the order of "dft. to Henry K. Bush Brown" for $100: also, draft of Elmira National Bank, signed by J. J. Bush, Cashier, dated 31st March, 1893, to order of Charles F. Jenkins, for $257.50, and a check dated 31st March, 1893, drawn by J. J. Bush on the Elmira National Bank to the order of "dft. to Charles F. Jenkins for H. K. B. B."

(These papers, and evidence as to their use on objection by plaintiff's counsel on the ground that they were not drawn to the order of Bush, were excluded.)

Plaintiff's counsel produces from among the papers in the hands of the plaintiff

**Exhibit No. 47.**

"ELMIRA, N. Y., April 3, 1893. No.
"Central Trust, 300
"Chase, 77 50
"ELMIRA NATIONAL BANK.
"Pay to the order of Dfts. on N. Y. ..... $377 50
"Three Hundred Seventy seven 50 ..... Dollars.
"J. J. BUSH.

Stamped across the face:
"Elmira National Bank
"Paid
"Apr 4 1893
"Elmira, New York."

## Exhibit No. 48.

"ELMIRA NATIONAL BANK. No. 24657.
"$300. "ELMIRA, N. Y., April 3rd, 1893.
"Pay to the order of Central Trust Co... $300$^{00}$
"Three Hundred ..... $^{100}$ Dollars.
"To the Chase National Bank, } J. J. BUSH,
"New York. } "Cashier."

Stamped across the face:
"Paid
"Apr 5 1893
"Chase
"National
"Bank."

Endorsed (stamped):
"Pay Merchants' Nat'l Bank,
"For Credit of the
"Central Trust Company
"of New York.
"O. H. P. BABCOCK,
"Secy."

(Also stamped):
"Merchants' Nat'l Bank,
"New York.
"Apr. 4 1893
"Paid."

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## Exhibit No. 3.

"ELMIRA NATIONAL BANK. No. 24658.
"$77. ELMIRA, N. Y., April 3rd, 1893.
"Pay to the order of Chase National
"Bank..... $77 50
"Seventy seven $^{50}$ ..... $^{100}$ Dollars.
"To the Chase National Bank, } J. J. BUSH,
"New York. } "Cashier."

Stamped across the face:
"Paid
"Apr 4 1893
"Chase
"National
"Bank."

Plaintiff admits that they were signed by Mr. Bush, and were not used for the purposes of the Elmira Bank, but objects to their admission in evidence on the grounds above stated.

There was evidence that Bush was in the habit of sending a bank draft monthly in payment of interest on his $25,000 note to the Chase Bank, and evidence tending to show that said $77.50 draft was for interest upon that note.

Objection to the said check and drafts overruled in each case, and exception in each case by the plaintiff.

The $77.50 draft marked Exhibit No. 47.

The Central Trust Company draft marked Exhibit No. 48.

The check corresponding to said exhibits marked Exhibit No. 3.

Plaintiff admits that none of the checks to the order of third parties which have been admittd in evidence were for the benefit of the bank in any way.

Defendant reads in evidence the following by-laws of the Elmira National Bank:

"Sec. 25. All contracts, checks, drafts, &c., and all the receipts for notes received from the Comptroller of the Currency shall be signed by the President or Cashier."

"Sec. 26. There shall be appointed by the Board of Directors a committee of three members whose duty it shall be to exercise a supervision of the business of the bank, and to examine every three months the affairs of this bank, count its cash, compare its assets and liabilities with the amounts in the general ledger * * * and to recommend such changes in the matter of doing the business as shall seem proper. The result of such examination shall be reported to the Board at the next regular meeting thereof."

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Defendant reads from the directors' minutes of The Elmira National Bank passages showing that on July 1, 1892, the resignation of C. C. Swan, as assistant cashier, tendered by letter dated April 15, 1892, was accepted and E. A. P. Smith was appointed teller, and was authorized upon furnishing satisfactory bonds to sign drafts and certifications in the absence of the president, vice-president and cashier. It was afterwards admitted that the last draft signed by Swan as assistant cashier was in April, 1892, so far as can be found.

Defendant further read from the minute book passages showing that the directors elected at the stockholders' meeting on January 13, 1891, were as follows: Jackson Richardson, Thomas S. Flood, E. L. Wyckoff, John Brand, John J. Bush, C. E. Selover, Henry E. Rosenbaum, Jacob B. Coykendall, Frederick H. Richardson, Rufus T. Peck, Charles Kellogg, F. Straat and Judson H. Clark for the year ensuing; also at a meeting of the Board of Directors, on the same day, that Judson H. Clark, J. B. Coykendall and Frederick H. Richardson were appointed the examining committee; that Charles E. Selover was elected president and Jackson Richardson vice-president; that on March 2, 1891, the directors accepted the resignation of Mr. Selover and elected Mr. Jackson Richardson president and Mr. C C. Swan director; also that at a meeting of the directors on September 1, 1891, D. C. Robinson was elected director in the place of H. L. Rosenbaum, resigned, and L. H. Drake in the place of F. Straat, resigned; that on January 12, 1892, at the stockholders' meeting the then Board of Directors thus constituted was re elected, except that E. R. Backer was elected in place of Thomas S. Flood, and that at the directors' meeting held on said day the following officers were elected, to wit: Jackson Richardson, president; Charles Kellogg, vice-president; J. J. Bush, cashier, and C. C. Swan, assistant cashier, and that the members of the Examining Committee were re elected; that on January 10,

1893, at the stockholders' meeting the Board of Directors thus constituted was re-elected, except that George Brand, H. C. Mandeville and Charles H. Carroll were elected directors in place of John Brand, Judson H. Clark and C. C. Swan; that at the directors' meeting on the same day the president, vice-president and cashier were elected, and that E. A. P. Smith was elected assistant cashier and Rufus T. Peck, Jacob B. Coykendall and Frederick H. Richardson were elected examining committee.

Plaintiff's counsel read Section 9 of the by-laws providing that the vice-president shall perform the duties of the president in case of his absence or inability to act.

Defendant's counsel resumes the reading of the examination of the deposition of J. J. Bush.

(From the examination by Mr. Thacher.) I have in my possession some checks drawn by myself on the Elmira National Bank and returned after payment of my vouchers. Some of my vouchers were not returned to me, and I have not got them in my possession.

I have with me certain checks of mine so drawn on the Elmira National Bank and returned to me. Among them are checks which, on their face, appear to have been drawn for drafts of the Elmira National Bank. Among them are thirteen which are now shown to me. These thirteen were all signed by me. The "Paid" stamp which is on all of them but one is the stamp of the Elmira National Bank, and the cut in the paper of the one that has not that stamp indicates cancellation by the clerk by placing it on the spindle. In the course of business, he would do that at the same time that he drew the draft indicated by the check.

I believe I received from the Elmira Bank the drafts indicated by or corresponding to the descriptions in these checks. I don't know on what bank

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these drafts were drawn, but I would believe that they were drawn on the Chase National. There is nothing in my recollection or in the drafts that would lead me to believe that, except it is the absence of the name of any other bank. When I drew a draft on any other bank, I entered the name of the bank on the check, so far as checks drawn for my personal drafts were concerned. I have every reason to believe that I received the drafts drawn against these checks. The said thirteen checks are eight checks subsequently admitted in evidence and marked Exhibits Nos. 51, 54, 55, 56, 58, 59, 60 and 66. One which was not offered in evidence and four which were formerly excluded, being marked Exhibits Nos. 61, 62, 63 and 68, for Identification. Two of the latter (Exhibits Nos. 63 and 68 for Identification) being for $100 and $30 respectively, were excluded on objection that the drafts drawn against them were not found, and that the checks did not specify that the drafts were to be the order of Bush. The checks were drawn to the order respectively of "Dft. to J. J. Bush" and "N. Y. Draft." Said Exhibits Nos. 61 and 62 for identification were as follows:

**Exhibit No. 61 for Identification.**

"ELMIRA, N. Y., April 18, 1892. No.
"ELMIRA NATIONAL BANK.
"Pay to the order of Cash for draft.....$500 00
"Five Hundred.....Dollars.
"J. J. BUSH.
"Count until return."
Stamped across the face:
"Elmira Nat. Bank,
"Paid
"Apr 27 1892
"Elmira, N. Y."

**Exhibit No. 62 for Identification.**

"ELMIRA, N. Y., Aug. 31 1892. No.
"ELMIRA NATIONAL BANK.
"Pay to order of Dft on N. Y. to order
"J. J. Bush ..... $1,066 88
"Ten Hundred Sixty Six 88 ..... Dollars.
"Count in items.
"J. J. BUSH."

Stamped across the face:
"Elmira Nat. Bank,
"Paid
"Sep 8 1892
"Elmira, N. Y.

Witness testifies that for four of these checks, respectively, he received the drafts which have been received in evidence as Exhibits Nos. 4, 6, 10 and 11. Said checks were afterwards admitted in evidence and marked respectively Exhibits Nos. 51, 58, 66 and 59. They are as follows:

**Exhibit No. 51.**

"ELMIRA, N. Y., April 2, 1891. No.
"ELMIRA NATIONAL BANK,
"Pay to the order of Dft to J. J. Bush ..... $170 83
"One Hundred Seventy 83 ..... Dollars.
"J. J. BUSH."

Stamped across the face:
"Paid
"Apr 3 1891
"Elmira, N. Y.
"Elmira National Bank."

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**Exhibit No. 58.**

"ELMIRA, N. Y., Mch. 8th, 1892. No.
"ELMIRA NATIONAL BANK,
"Pay to the order of Dft. to order J. J. Bush. $96 81
"Ninety-six 81 ..... Dollars.
"J. J. BUSH."

**Exhibit No. 59.**

"ELMIRA, N. Y., May 6, 1892. No.
"ELMIRA NATIONAL BANK,
"Pay to the order of Dft. to order J. J. Bush..$5$^{00}$
"Five.....Dollars.
"J. J. BUSH."

Stamped across the face:
"Paid
"May 6 1892
"Elmira, N. Y.
"Elmira National Bank."

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**Exhibit No. 66.**

"ELMIRA, N. Y. Feby. 18, 1892. No. 284.
"ELMIRA NATIONAL BANK,
"Pay to the order of Dft. on New York....$30$^{00}$
"Thirty.....Dollars.
"J. J. BUSH."

Stamped across the face:
"Paid
"Feb. 19 1892
"Elmira, N. Y.
"Elmira National Bank."

The witness produces seven more checks, being five checks subsequently admitted in evidence and marked Exhibits Nos. 50, 53, 57, 64 and 65, and two which were excluded on the ground that they did not appear to have been drawn from drafts to the order of J. J. Bush. They were marked respectively Exhibits Nos. 70 and 71 for identification, and were for the respective amounts $400 and $649.82, and were each drawn to the order of "Dft. on Philadelphia."

These are some of the checks I referred to as drawn for drafts of the Elmira National Bank and

by it returned among my vouchers. They were all signed by me. The paid stamp on them is that of the Elmira National Bank. I believe that I received drafts of that bank on the banks indicated in the checks for the amount stated therein. I believe that the numbers 266 and 267 in the corner of the $500 check of October 5, 1892 (being Ex. No. 57) indicate the numbers of the two drafts which were given for that check; those numbers were made by me.

Q. I am asking you whether or not as a matter of memory you know whether in some cases in which you gave these checks you actually received drafts?

A. I cannot remember, Mr. Thacher, of taking a draft for any one of them, but from the face of them I believe I got drafts for them all.

Q. Did you get cashier's drafts of your bank at any time at all on checks that you drew on the Elmira Bank?

A. I know I did.

Q. Did you in cases where you drew checks showing on their face that they were drawn for drafts, as in the case of checks you have exhibited to-day?

A. I did, because I have seen some of them.

Q. Do you know whether you drew as many checks as you have exhibited to-day in that form on which you did not get cashier's drafts on the Elmira Bank?

A. I don't believe I did.

Q. Do you know?

A. I don't know absolutely and positively, but I am pretty sure that I got drafts for them.

Q. You have exhibited nineteen checks drawn by you on the Elmira National Bank to the order in some form or other of drafts, all of which appear to have been paid by the Elmira National Bank and returned to you as vouchers. Is it possible, from your recollection, that in so many cases as these you did not receive the drafts called for by those checks?

A. It is not possible.

Q. Is it possible that you did not receive them in a large proportion of those cases?

A. I do not believe so.

Q. As a matter of fact, have you not a strong belief that you did actually in almost every one of those cases receive such a draft?

A. It would require the evidence of the books to convince me that I did not receive the drafts in each one of the cases.

Q. Your conviction from your knowledge of the transaction is such that you feel very confident of it, is it not?

A. I believe that is what those checks were drawn for.

Q. And that they achieved the purpose for which they were drawn?

A. I do.

Q. They were all your transactions?

A. They were transactions connected with the drafts.

Q. If a check failed to bring the draft called for, you would be very apt to have some recollection of it, would you not?

A. I believe so.

The words "count until return" written on the corner of one of these checks (Ex. No. 61 for identification, dated April 18, 1892, for $500) and "count in items" in the corner of another (Ex. No. 62 for identification, dated August 31, 1892, for $1,066.88) mean carry the check as a cash item in the cash drawer, and do not enter it in my account until my return from some absence.

Plaintiff's counsel read a part of Bush's deposition which preceded the foregoing questions and answers, as follows:

(From the examination by Mr. Whitney.)

Q. (Referring to the two checks for $500 and $1,066.88 afterwards excluded, marked Exhibits Nos. 61 and 62 for identification, and stated to be for drafts on the Chase Bank.) It says in one case (Ex. No. 62

for identification), "Draft, New York to the order of J. J. Bush." But as we have failed to find any draft corresponding to that, isn't it possible that the phrase on the face of the check does not state what actually occurred after the check was put in, and that actually it was held as cash, and that cash was handed out instead of a draft on New York?

A. Well, of course, I am giving this testimony from the face of the instrument without any absolute knowledge of the facts. If the instrument is wrong, my testimony is wrong.

Q. You said you had a recollection that this was carried among the cash items for a while; if it was carried as a cash item it would be carried as cash taken out of the drawer; carrying a check as a cash item means carrying a check in the place of cash taken out of the drawer.

A. I don't know how that would operate. Of course the books would be the best evidence of that transaction. If you do not find that a draft was issued on any of the banks that is stronger, testimony than my memory.

Witness examines record of drafts on the Chase National Bank and states that he cannot find a draft corresponding to the check referred to.

Q. (Referring to the same two checks, Exhibits Nos. 61 and 62 for identification, afterwards excluded, one being drawn to the order of "Cash for draft" and the other of "Dft. on N. Y. to order J. J. Bush.") Isn't it possible that there were no drafts ever given for these two checks, but that after the checks were written out that it was changed and the cash taken out of the drawer and the direction as to counting written on the face of the check?

A. It may have been that that was done, but it was after the check was drawn. After examining the books, I am not as positive as I was at first that drafts were actually issued for those two checks, because I find no record of it. As to the other cases,

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where I have produced checks here, stating on their face that they are for drafts, I know nothing further than what appears on the face of the check. I have no knowledge other than of the draft books being correct.

Plaintiff's counsel also read from said deposition as follows:

(From examination by Mr. Whitney.) Six of the seven checks drawn on the Chase Bank are for drafts on Philadelphia, I believe. To the best of my judgment, they were used in the Southern litigation, the Ellijay litigation that I referred to yesterday. The expenses of this litigation were entirely for the benefit of the Elmira National Bank.

Plaintiff concedes as to the checks subsequently marked Exhibits Nos. 50, 53, 54, 55, 56, 60 and 64, that drafts were issued by the Elmira National Bank at the dates and for the amounts thereof respectively, which drafts cannot be found among the vouchers in the hands of the plaintiff; that there are some indications that at least one of the Philadelphia drafts was to the order of Bush; that the drafts corresponding to the checks, Exhibits Nos. 54, 55, 65 and 60, were drawn on the Chase National Bank; and that the books of the Elmira Bank do not show to whose order drafts on the Chase National Bank were drawn prior to October, 1892.

Defendant offers in evidence two of said six checks drawn for drafts on Philadelphia. Objected to on the ground, first, that the witness has testified that they were for the benefit of the Elmira National Bank; and, second, that it does not appear that the drafts issued for said checks were signed by Bush. Objection overruled. Exception. Checks marked Exhibits Nos. 50 and 53 respectively. They are as follows:

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## Exhibit No. 50.

"ELMIRA, N. Y., Jany. 3, 1891. No.
"ELMIRA NATIONAL BANK.
"Pay to the order of Dft. to order of J.
"J. Bush ..... $669 91
"Six Hundred Sixty Nine 91 ..... Dollars.
"on Merchants, Phila.
"J. J. BUSH."

Stamped across the face:
"Paid
"Jan. 5 1891
"Elmira, N. Y.
"Elmira National Bank."

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## Exhibit No. 53.

"ELMIRA, N. Y., April 15, 1891. No.
"ELMIRA NATIONAL BANK.
"Pay to the order of Dft. to J. J. Bush,
"Philadel ..... $552 55
"Five Hundred Fifty two 55 ..... Dollars.
"J. J. BUSH."

Stamped across the face:
"Paid
"Apr. 16 1891
"Elmira, N. Y.
"Elmira National Bank."

Defendant offers four of the checks above testified to by Bush not stated to be for drafts on Philadelphia. Objected to on the second of said grounds, and on the ground that it does not sufficiently appear that any of the drafts drawn for said checks were to the order of Bush. Objection overruled. Exception. Said checks were marked severally Exhibits Nos. 54, 55, 56 and 60, and are as follows:

## Exhibit No. 54.

"ELMIRA, N. Y. Aug. 31, 1891. No. 93.
"ELMIRA NATIONAL BANK.
"Pay to the order of Dft. to J. J. Bush..$100 00
"One Hundred.....Dollars.
"J. J. BUSH."

Stamped across the face:
"Paid
"Sep. 1, 1891
"Elmira, N. Y.
"Elmira National Bank."

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## Exhibit No. 55.

"ELMIRA, N. Y. Sept. 30, 1891. No. 129.
"ELMIRA NATIONAL BANK.
"Pay to the order of Dft. to order J. J. Bush $306 67
"Three Hundred Six $^{67}_{100}$.....Dollars.
"J. J. BUSH."

Stamped across the face:
"Paid
"Oct 1, 1891
"Elmira, N. Y.
"Elmira National Bank."

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## Exhibit No. 56.

"ELMIRA, N. Y. Dec. 31, 1891. No.
"ELMIRA NATIONAL BANK.
"Pay to the order of Dft. to J. J. Bush..$306 67
"Three Hundred Six $^{67}_{100}$.....Dollars.
"J. J. BUSH."

Stamped across the face:
"Paid
"Jan. 2, 1892
"Elmira, N. Y.
"Elmira National Bank."

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## Exhibit No. 60.

" Elmira, N. Y. June 6, 1892. No.
" Elmira National Bank.
" Pay to the order of Dft. to J. J. Bush...$769 03
" Seven Hundred Sixty Nine 03.....Dollars.
" J. J. Bush."

Stamped across the face:
" Elmira Nat. Bank.
" Paid
" Jun 7 1892
" Elmira, N. Y."

Defendant's counsel also offered in evidence one more of said checks, and it was admitted and marked Ex. No. 57. It is as follows:

## Exhibit No. 57.

" Elmira, N. Y., Oct. 5, 1892. No.
" Elmira National Bank,
" North America.
" Pay to the order of Drafts to J. J. Bush...$500 22
" Five Hundred.....Dollars.
" ♯ 266
" ♯ 267 J. J. Bush."

Stamped across the face:
" Elmira Nat. Bank,
" Paid
" Oct 24 1892
" Elmira, N. Y."

Defendant's counsel also offered in evidence three more of said checks, and on objection by plaintiff's counsel, they were excluded as above stated and marked Exs. Nos. 61, 62 and 63 for identification.

By Defendant's Counsel:

(From examination by Mr. Whitney.) I think that my deposit account in the Elmira National Bank was written up whenever the clerks got time. I don't think there was any regular time. I don't think that I have had the checks returned to me from that account; not in 1893. I am unable to say how often the checks were returned to me, but it was at long periods. They were all in the vaults and at my disposal. My pass book was not balanced as often as the ordinary account books would be. I have not my book. I would say that it was balanced every three to six months. When it was balanced, my returned checks would be placed with it, delivered to me, or placed at my disposal I think the Receiver has my pass book. I would be unable to say when I last saw it. When my pass book was balanced, I don't recollect that I ever complained of the balances in my favor being too small I didn't examine my account on the books of the bank very often. I would not be able to say how long before the failure of the bank I examined it for the last time. I couldn't say that I did not within a month or two. I presume in looking through this ledger I ran across my account, but I never went especially to look at my account at any time.

Q. Was it your duty as cashier to look up depositors' accounts in the bank, and to see how they stood? A. I tried to keep an account; yes, sir. I presume I saw every ones account including my own. I can't say whether I had looked over these accounts within six months before that time, because I was very busy during that time. It was the duty of the assistant cashier to report to me the overdrafts. I might not have taken that book in my hands and still have kept account of the overdrafts, and still have complied with my duties as cashier. I think it possible that I had not looked at the depositor's ledger for six months before the failure of the bank.

The vouchers which I have produced here were among the papers that my attorneys have. They have not all of my returned vouchers, but I sorted out all the vouchers that I thought would have any value to me in my cases under my indictment. The rest of them are at my house. I can't tell now, but I think November, 1892, was the last I had seen of my vouchers, because I do not find any others. The time when I looked my vouchers over was at the time of my trial, or our trial in Buffalo in 1896. I have not looked them over particularly since. My best recollection of what I found in 1896 is that November, 1892, are the last vouchers that I have. My recollection about it is based on what I found in 1896 when I looked these vouchers over. I obtained from my attorney's clerk all of the vouchers that he was able to find for me in my attorney's absence—checks of the Elmira National Bank. These were checks that I had sorted out previous to this deposition. When I sorted out the papers, I had a lot to go through. These particular vouchers that I produced here I went and got from my attorney at the request of a letter of Messrs. Reed, Simpson, Thacher & Barnum. At their request I produced them. I didn't do any sorting of them. They had been sorted out and separated from among the rest before I received this request, because my attorney and I thought that they would be wanted, and because they were for drafts to the order of J. J. Bush. I received this request by Thursday of this week.

All the drafts that were paid to the correspondent banks during the month were put together at the end of the month and returned to the Elmira National Bank. They were then compared by some one with the records of the Elmira National Bank to see if they tallied. I think the work was done by any one of the clerks who happened to be the least busy, sometimes by Mr. Smith, sometimes by clerks under him. These bundles were tied up again and put away in the vaults of the bank. There was a

loan committee of the directors and an examining committee. The examining committee was the committee which did the auditing of the books and papers of the bank, independent of the loan committee. I sometimes have seen that examining committee at work. They started by counting the checks and the cash items, and then I have seen them look at the depositor's ledger and the various books of the bank

(From the examination by Mr. Thacher.) If I was in the bank when they were examining, I would be apt to see every act of this committee. I would be busy a good deal of the time. I don't think that I saw everything that every member of that committee did. I couldn't say that I saw every act of every director when they were looking over the bank matters. The fact that my account on the Elmira Bank ledger appeared to be overdrawn did not give me any anxiety. The amount of its balance whether great or small was satisfactory to me.

I have no definite knowledge as to when I last examined my account in that book. My examination of my account on the ledger was not for the purpose of definitely ascertaining how that account was stated on those books. This case had not started when my checks were sorted out. They were sorted out by me in the gathering of papers that I felt it would be advisable to have on hand in view of any litigation that might come up.

Q. They were sorted out at whose instance?

A. My own.

Q. Sorted out by you as checks drawn for what purpose?

A. For drafts to my order.

Plaintiff's counsel read a part of the same deposition which preceded the part just read from the examination by Mr. Thacher.

(From the examination by Mr. Whitney.) These twenty checks of mine drawn on the Elmira National Bank and payable to the order of drafts were

the only checks of mine drawn on the Elmira National Bank and payable to the order of drafts wnich I was able to find in my possession. When I stated that all the drafts drawn by me on other national banks, which were produced yesterday, were drawn openly and without concealment, I mean that they were drawn like any other drafts in the course of business. I drew it and mail it and leave my check in the place of it. As soon as it was drawn it was supposed to be entered on the draft book. I know of no cases where it was not. It was immediately afterwards put in a sealed envelope and sent to some one. That is the way drafts would be used. It was not exhibited to any of the directors or the president of the bank. I think the Bank of North America had no draft book. I think the Quaker City Bank had one. The drafts on the Hide and Leather Bank were on stubs, and I guess the Bank of North America also. According to the course of business I believe that drafts were entered in the draft book or on stubs when drawn. There would be no stubs for the Hide and Leather Bank. It was to pay a debt, and went right on to the Hide and Leather book. In the case of a draft on the Chase National Bank there were no stubs. It was entered in a book, with an entry in the cash book and on the draft record, but of course the books would be the best evidence. (Draft book of the Chase National Bank exhibited to witness.) From September 23, 1889, to October 7, 1892, there was nothing there except the number and the amount and the date; the date on which the draft was drawn; the number of the draft; the amount of the draft; the exchange; and the day on which it was paid by the bank on which it was drawn. After October 7, 1892, one more column was added. That column contained the name of the payee of the draft. The name of the payee had not been preserved prior to October 7, 1892, in the draft book of the Chase National Bank.

Q. Was it ever customary to preserve the name of the person at whose request the draft was drawn?

A. That was in charge of my assistant, and I would have to refer to the books to give you an answer; I have no knowledge. It was not the custom in the Chase National Bank to enter this on the draft book. I don't remember any cases anywhere where it was customary to enter the name of any person on whom the draft was drawn. I would have to refer to the books of the bank, but I don't remember it. I think the drafts so drawn came back to the Elmira National Bank monthly.

Q. (Referring to the witness' statement that the method of doing business by the examining committee of the directors was to start by counting the checks and cash items and then look at the depositor's ledger and the various books of the bank) What else?

A. I should say that that was about the extent of their examination. I think the loan committee took charge of checking up the loans, so I don't think there was any other work for the examining committee. I never saw the examining committee examine the bundles of returned drafts from the Chase National Bank, or any of them, or bundles of returned drafts from any other bank, or the bundle of checks from any depositor. I never saw any director examine any of the checks of the depositors, or any of the drafts of our bank on other banks. There was no conversation between me and the directors of the bank at any time as to who signed any particular draft given by the Elmira National Bank on any other bank. I never saw any director of the Elmira National Bank look to see who signed any such draft.

Defendant's counsel offered in evidence three more of the checks produced by Bush and testified to by him as being for drafts, and on objection by plaintiff upon the ground above stated in

regard to said drafts they were excluded, being marked Ex. Nos. 68, 70 and 71 for identification.

Plaintiff's counsel stated that it appeared from the records of the Elmira National Bank that at the times of Exhibits Nos. 50 and 60 there was no assistant cashier of that bank, also that on the books of that bank one of its Philadelphia correspondents is credited with drafts corresponding in date and amount with two of the six checks for Philadelphia drafts produced and testified to by Bush.

Defendant's counsel offers in evidence one of said last mentioned checks. Same objection as to the check Exhibit No. 50. Objection overruled. Exception. Marked Exhibit No. 64. Said check is as follows:

**Exhibit No. 64.**

"ELMIRA NATIONAL BANK, No.
"ELMIRA, N. Y. 3/5, 1891.
"Pay to the order of Phila. Dft. to J. J. Bush
.....$400 00
"Four Hundred .....Dollars.
"J. J. BUSH."

Stamped across the face:
"Paid
Mar. 5, 1891
Elmira, N. Y.
"Elmira National Bank."

EDWIN A. LEE, a witness for the defendant, testified as follows:

I reside at South Orange, New Jersey, and have been since May, 1899, discount clerk in the Chase National Bank. I have been connected with that bank since September 16, 1889. I have in my hand a certain book of the Chase National Bank, the loan book. It includes a statement of the principal and interest payments on a loan by the bank to J. J. Bush

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of Elmira—a personal loan, as distinct from a loan to the Elmira Bank. It is a loan under date of February 18, 1891. The amount originally was $25,000. On May 5, 1893, it had been reduced by payments to $15,000, with unpaid interest, $12.50. The account shows monthly interest payments from the period included between February 18, 1891, and May 5, 1893, with one or two exceptions where the interest was quarterly. All that appears on the book. I have not computed the interest to prove that it is a correct account, but, from my best judgment and knowing the course pursued by the bank, I should say that the interest stated on the book was the proper amount. The book shows loans to the Elmira Bank, as well as to Bush individually.

I have here the books containing the original entries as to the transactions of May 5, 1893. They were entered partly in what we call a duplex and partly in a book called a collection registry. I have them here. There are two kinds of deposits. One is a deposit made by our New York City customers; another is a deposit made by our country banks, made by way of a letter. The latter deposits are accompanied by a letter, usually stating what the deposit is. When the deposit is not made by a letter and the draft or currency deposited does not come through the mails or by express, the usual custom is to have a letter made up. We have a form which we fill out. On some occasions we have deposit slips; other occasions we have not. When a deposit of currency is made in our bank, or when a check is deposited by some one then present, there is usually either a deposit slip or a letter of some sort handed in. Those letters and deposit slips are preserved. They are kept among the papers of the bank. That is the usual custom of the bank.

It is conceded that search has been made among the papers of the bank for deposit slips, but none has been found upon either the $8,000 or the $7,000 deposit of May 5, 1893.

CROSS-EXAMINATION by Plaintiff's Counsel:

The duplex book which I hold in my hand contains a set of original entries of the transactions of the bank on May 5, 1893. The book endorsed "Time Collections" contains at pages 81-3 an account in which are contained the original entries of drafts deposited by the Elmira National Bank for collection. The entry of the $7,000 Quaker City draft of May 5, 1893, reads as follows:

| Date. | Payer. | Where sent. | Amount. | Date. | Check from | Paid. |
|---|---|---|---|---|---|---|
| May 5. | Quaker City National Bank. | Philadelphia. | $7,000. | May 4. | 89. | May 8. |

No. 89 is the number of our account with the Elmira National Bank.

Q. That entry differs in no respect from the entries of other drafts deposited by the Elmira National Bank for collection at various times, does it? It is the usual form of collection entry, is it not? I mean it does not indicate on its face that the sum when collected was to be devoted to any particular purpose?

A. It does not show here. It does not appear to be a special deposit in any way.

It is conceded that there is no entry on the duplex of the $8,000 item, and that an explanation of the absence of it will be afforded later on on behalf of the Chase National Bank.

I find on the duplex an entry of the check of $15,012.50 on May 5, 1893. The entry next following is the entry of the payment of the J. J. Bush loan, I should say. It would be identified by the number. The number of the loan was 8952. The entry is as follows:

| " Charge. | Credit. |
|---|---|
| " $15,012.50 Cash, Dft.—Elmira National " Bank, N. Y. | |
| " Demand Loan No. 8952 | $15,000 00 |
| " Interest | 12 50 " |

It is admitted in lieu of further cross-examination of Mr. Lee that the cashier of the Chase National Bank is here, and personally states that in regard to the deposit of the $8,000 currency on May 5, 1893, according to the usual custom, if no deposit slip had been made out, the currency would appear as a credit in the duplex form, and hence he believes that a memorandum letter of some sort was made out by somebody covering this item, but the letter he is unable to find after making a thorough search.

CHARLES F. GALE, recalled and examined on behalf of the defendant, testified as follows:

I never knew Mr. Bush while he was cashier of the Elmira National Bank. I had no connection with the bank or its books until after Mr. Davis became receiver. I gained some insight into the books four or five days after I became assistant to Mr. Davis. I never knew of or heard of any one connected as an officer of the Elmira Bank other than Mr. Bush, its cashier, whose initials are J. J. B.

[DEFENDANT RESTS.]

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Deposition of JACOB B. COYKENDALL, taken at Elmira, October 6, 1900, read in evidence on behalf of the plaintiff, as follows:

I reside at Elmira, N. Y. I was a director of the Elmira National Bank at the time of its failure, and had been so for two or three years previously. I was one of the examining committee of the Board of Directors, I think about two years. The other members of the committee were F. H. Richardson and J. H. Clark. I was an active member of the committee and personally conducted the examinations. Mr. Clark very seldom came, but Mr. Richardson was always there with me. I think we were both always present at the auditing of all the books

and papers by the committee. The auditing was done every two or three months.

Q. And how was it done? What steps were taken by the committee?

A. We first took the notes and tabulated them and added them up, and then added to that amount the various notes that had been sent off for collection, for rediscount, to see if they balanced with the discount ledger—I mean the notes of the various persons that had been discounted at the bank. We then counted the cash to see that it agreed with the balance. That was the main part of it. There were no other steps that I remember.

Q. Did you ever examine any of the returned drafts from the Chase National Bank, or other corresponding banks?

A. No, sir.

Q. Did you ever examine any of the checks of the depositors in the bank?

A. No, sir.

Q. Did you ever have your attention called in any way to the question which officer of the bank signed these drafts on other banks?

A. No, sir.

Q. Did you ever have any conversation with Mr. Bush as to whether or not he was signing drafts to his own order?

A. I knew nothing about that at all. No, sir.

Q. So far as you were aware, was there ever any conversation by any of the directors of the bank in reference to this matter?

A. Not that I was aware of; no, sir.

I am in the insurance business at Elmira. I am thirty-six years old. I have named all of the people who were on that examining committee that I can remember of now. There might have been a change in the committee, but I don't remember it. The only committeeman that acted with me, as I said before, was Mr. Richardson. That I am absolutely sure of. I don't remember when I was appointed a member of the committee. Frederick H.

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Richardson was the man that acted with me in the examinations. I think the other man was Judson H. Clark. I would not be surprised to find from the record that somebody else was on the examining committee. I know the two members that did the examining, the members of this committee. There might have been other members on the committee, but we looked this over, that I know. I don't know that the other members did not make any examination, except those that Mr. Richardson and I made. I don't remember of Mr. Peck's being a member of the examining committee. I did not know for a certainty who was signing cashier's drafts on our bank. I don't know what the other directors individually knew about that. So far as I was personally concerned, I left it to Mr. Bush's personal judgment and control as to how he signed those drafts. I don't mean by the last answer that I ever had any conversation with Mr. Bush about it. Mr. Richardson was a shoe manufacturer in Elmira. Mr. Clark was a capitalist and breeder of live stock in the neighborhood of Elmira.

Plaintiff put in evidence from the directors' minutes the report of the examining committee for the year 1891 for the sole purpose of showing that the members of the examining committee who acted on the committee and signed the report were J. B. Coykendall and Frederick H. Richardson. Plaintiff also offered the report from the directors' minutes of the examining committee for the year 1892, made December 13, 1892, for the sole purpose of showing that it recites the examination as having been made by J. B. Coykendall and F. H. Richardson, although it is signed by Richardson alone.

CHARLES F. GALE, recalled and examined on behalf of the plaintiff:

The records, papers, vouchers and books of the Elmira National Bank have been in my custody and under my care since the time I first went there. So far as I am aware they are still in my possession, except those which have got into the possession of the lawyers in this case. I have not been able to find Mr. Bush's pass-book among my papers. I have searched for it. I never saw it. There were no checks of Mr. Bush's that had been paid by the Elmira National Bank, found by me in possession of the bank outside of those checks and vouchers which were handed over to plaintiff's attorneys at the time of the last trial of this case. Those checks and vouchers went back I think to about the first of April or last of March prior to the failure of the bank. They were all produced here, and examined by the two parties to this case on the previous trial. I have looked to see whether there were any vouchers of Mr. Bush's between November, 1892, and these vouchers in the possession of the bank, but I never found any. I don't know of any draft books or stub books of drafts drawn by the Elmira National Bank on other banks which came into the possession of Mr. Davis as Receiver, except those which were here in court. I have searched through the papers for all draft books and stub books. I have found no trace or indication of any ledgers, day books or cash books which are not in court. I have found some drafts that have not got any stub book or draft book to correspond with them. I don't know whether those drafts were drawn out of a stub book or not. I don't know anything about it. There has been an examination made of the returned checks or drafts which had been drawn by the Elmira National Bank on the Chase National Bank and afterwards returned by the latter, to find out how many of them were to the order of J. J. Bush. The examination was made by myself and Mr.

Hickok and Mr. Thacher, defendant's counsel. I placed all of those drafts that I knew about at the disposal of Mr. Thacher for his examination. I have found three other drafts among Mr. Davis' papers. They are not to Mr. Bush's order. I have made a search to find out whether there were any other returned drafts that have got out of place. I have not found any.

Plaintiff's counsel reads from the general ledger of the Elmira National Bank an entry of April 16, 1891, crediting the Merchants' National Bank of Philadelphia with $552.55 (being the amount of the check Exhibit No. 53).

The drafts now shown me came from my custody. They are the drafts drawn by the Elmira National Bank on the Chase National Bank on April 16, 1891, all of them. They are all signed by C. C. Swan as assistant cashier.

Said drafts offered in evidence for the purpose of showing that C. C. Swan was the person signing drafts of the Elmira National Bank on said day. Said drafts (fifteen in number) marked Exhibit P.

The search for those drafts was made under my supervision. There has not been found any drafts signed by Mr. Bush on that day. That search I instructed to be made thoroughly.

Plaintiff reads in evidence an entry in the ledger of the Elmira National Bank under date of May 11, 1891, a credit to the Corn Exchange Bank of Philadelphia of $653.05.

The package of papers shown me contains, so far as search has shown, all the drafts drawn by the Elmira National Bank on the Chase National Bank on May 11, 1891. My instructions to the officers making the search were to make as thorough a search in this case as any other.

Papers received in evidence and marked Exhibit PP. They are all signed by Swan.

The book shown me is the Elmira Bank's record of the drafts drawn by the Elmira National Bank on the Chase National Bank during the entire connection of those banks. It is the book which was referred to by Mr. Bush in his deposition. My knowledge of the book is simply from the fact of having found it among the books of the bank.

Plaintiff's counsel reads in this book the entry of September 1, 1891, of the draft No. 9,784, drawn by the Elmira National Bank on the Chase National Bank for the sum of $100.

The bundle of papers now shown me are all the vouchers which have been discovered on the search made by me which are returned drafts drawn by the Elmira National Bank on the Chase National Bank on September 1, 1891. We have not been able to find the draft corresponding to check Ex. No. 54.

Drafts received in evidence. Marked Exhibit Q Three of them are signed by Swan and eleven by Bush.

Plaintiff reads from the same book an entry of a draft drawn October 1, 1891, by the Elmira National Bank on the Chase National Bank, No. 10,515 for the amount of $306.67, stating that this was one of the drafts which they had been unable to find (see check, Exhibit No. 55.)

Plaintiff offers in evidence the bundle of drafts of the date of October 1, 1891. Received and marked Exhibit R. They are signed four by Swan and fifteen by Bush.

Plaintiff reads from the same book the entry of the draft drawn by the Elmira National Bank on the Chase National Bank No. 12,938 on January 2, 1892, for $306.67 (see check, Exhibit No. 56).

Plaintiff offers in evidence the bundle of vouchers found on the examination described by Mr. Gale, being all the vouchers of January 2, 1892, which were found, and not containing

said voucher No. 12,938. Received and marked Exhibit S. They are signed three by Swan and twenty-six by Bush.

The vouchers which were thus examined are the same which I furnished Mr. Thacher three weeks ago for the purpose of his examinaion.

Mr. Thacher states that he made a very rapid and hasty examination of about one-third to one-half of the drafts which Mr. Gale exhibited to me as all the drafts of the Elmira National Bank in his possession; that he did not discover any to the order of J. J. Bush that have not been offered in evidence to day; that he was assisted by a young man and does not think that the latter found any to the order of J. J. Bush other than those which have been offered in evidence; that he had no opportunity to ascertain whether those were all of the drafts which had been drawn by the Elmira National Bank or not; that they were in a very mixed condition.

On my examination I found among all of the returned vouchers only the ones that have been produced here to the order of J. J. Bush individually.

CROSS-EXAMINATION by Defendant's Counsel:

I became Receiver in May, 1896. From that time I suppose I am responsible for the safe custody or safe keeping of all the papers connected with the business of the Elmira National Bank, so far as I could. I have considered it my duty so to do. Prior thereto the papers and records were in the personal custody of Mr. Davis. He is dead. I never went over anything, except the vouchers in the fore part of the receivership extending as far back as December, 1892, and the vouchers of the other banks which have been produced here we examined only for the month of May.

I have made no detailed examination of the record or papers back of 1892; not to check up from the books at all. I am a bookkeeper myself with some experience. To ascertain whether I had in my possession all the cashier's drafts of the Elmira National Bank, I would go about it according to how the books were kept. It would be according to what records they kept. It would involve the checking up of the drafts with the entries on the books that properly should correspond to such drafts. I have never done that. No one has ever done it on my behalf, so far as I know. Certain papers or drafts bearing the name of J. J. Bush, have turned up or have been found which were not used upon the last trial. It was within two or three weeks that I made an examination of the papers and books of the bank for the purpose of satisfying myself or anybody else how many drafts J. J. Bush had drawn as cashier to his own order. I did it at my own instance.

The papers, checks and drafts of this bank when I first saw them, when I was acting as assistant to Mr. Davis, were in the bank building in a room that the bank occupied in the Robinson building, an ordinary brick building. I don't remember seeing any drafts or vouchers in the bank building. They were moved upstairs by the clerk. The first recollection that I have of seeing any drafts or canceled vouchers on any bank was when we moved upstairs. I could not state whether they were in the bank or not. The Receiver's office was moved upstairs into an office within two or three weeks after the Receiver took possession. Some of the drafts were done up in bundles, and some were not done in bundles. They were undone. I meant with a wrapper around them, a loose wrapper fastened with a pin. I have in town here all there is of them. There were a great many of them, a great many thousand. I don't know anything about how they had been kept of my own personal knowledge, until some time after

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the failure of the bank. The whole force of the bank was there part of the time under Mr. Davis when I acted as his assistant, and then it was reduced as their services were not needed. I could not state exactly how many there were in the whole force - four or five. They had ceased to perform any duties under the bank officers, and they went to work for the Receiver. I did not see them handle these papers, drafts and checks, and don't know whether they did or not. I first saw Mr. Bush a day or two after I became assistant to Mr. Davis. He was there in Elmira. He was in and out of the bank building from time to time, I should think. I can't recollect. I can't remember all about these little details. I remember seeing him in the bank building in the Receiver's office. I don't know whether he had free access to the Receiver's office or not. He came in when I was there. I knew of no orders to keep him out of the building. Mr. Bush was in the office frequently. I presume he is in Elmira yet. I did not know before the last examination of Mr. Bush on Mr. Whitney's notice that he was in possession of certain checks which have been offered in evidence here, reciting that the drafts had been given to his own order. Prior to this examination I had no communication with him as to whether he had such checks or drafts. So far as I know Mr. Swan is living. I do not know that any of the persons who were directors of the bank a few months before it failed are now dead, except Mr. Jackson Richardson. Shortly after the failure of the bank I saw from time to time some persons who were directors in a business way. I don't know whether I ever saw all of them or not. They were mostly residents of Elmira. I don't know anything about the stub book of the Merchants' National Bank of Philadelphia. I never found any stub book of the drafts on the Chase National Bank, which contained the names of the payee of such drafts. I never found any traces of any such

book. I never inquired of the vice-president or any former officer or director of the bank whether there was any such stub book kept. I never had occasion to. I never inquired of any such person whether there was any stub book that would contain the entry of the fact that drafts were drawn by J. J. Bush as cashier to his own order. I never had any occasion to inform myself. I did not do it. I have never compared the checks, Exhibits P, Q, R and S, with any book of the bank in order to ascertain whether they were all the cashier's checks that were drawn upon their respective dates. All my testimony amounts to is that I or somebody else have looked for certain drafts among the files or bundles of drafts of a certain day and found these, and have not found any others. There were in the Elmira Bank's record of drafts on the Chase National Bank twenty-one entries of cashier's drafts drawn October 1, 1891. I produced nineteen, and am unable to find any others. My attention has never been called to the discrepancy between the number of drafts and the drafts that I produced until you called it to my attention just now. The book thus shown me has been produced in Court and used as an exhibit before. I can't understand how it is that there are two drafts missing. I can't tell how many drafts of the bank are now missing from those that were in its possession at the time of its failure. I don't know anything about who took them. I don't know anything about it at all. There were eighteen drafts entered in the book on September 1, 1891, and I am able to produce only fourteen.

REDIRECT-EXAMINATION:

By my statement that I never examined the papers of the bank in detail back of November, 1892, I meant a checking up of the accounts as far as December, 1892. By checking up the accounts I mean going over each item separately and comparing it with the

Chase National Bank's account. I examined all of the vouchers in the bank since the last trial. I did it two or three weeks ago, since the deposition of Mr. Bush at Elmira. I examined them before I went to Elmira to attend that deposition, and since I went to Elmira. Mr. Thacher's examination was made before he went to Elmira. I examined or caused to be examined each one of the vouchers at that time. I went over as many as half of them myself anyway. Mr. Hickok went over the rest. He is a clerk for the Receiver of the Broome County Bank, at Binghamton. I procured his assistance to make this examination. He is a trustworthy person. He was instructed to look for every check that he could find drawn to the order of J. J. Bush. The matter of the investigation of checks or drafts to the order of J. J. Bush was first brought to my attention on the last trial. That was about a year ago. All the drafts back to December, 1892, were here present then. The earlier ones were in Binghamton. They were sent for, but not brought down, I don't think. Back to December, 1892, were the only ones that were here, I think. The papers that have been found since, that were not here on the last trial of this action, were drafts to the order of J. J. Bush during the whole existence of the bank. At the last trial all the vouchers were present back to December, 1892, on the Chase National Bank, and all the vouchers in my possession on any other bank, so far as I knew, for the existence of the Elmira Bank. The papers that have since been produced are the vouchers of the Chase National Bank prior to December, 1892. The vouchers which I have stated to be loose when I took possession of the bank were vouchers on banks other than the Chase National Bank. I did not find any loose vouchers of the Chase National Bank. The vouchers of the Chase National Bank prior to November, 1892, were done up with a paper strap around and pinned to-

gether. I should think there were 25,000 in the whole lot, one bundle for each month. They were done up in bundles, one bundle for each month. I don't know whether these bundles had ever before been opened since Charles Davis took charge as Receiver. I never knew of any of them being opened. Mr. Bush did not have access to the vouchers in the custody of the Receiver. He could go into the office at any time, it was open, I suppose, and find some one there. He could not examine the papers without leave. I was Mr. Davis' clerk and I suppose I had general charge of affairs. I was the person generally in charge of the office. Mr. Davis and I were both generally there.

Draft record of drafts drawn by the Elmira National Bank on the Chase Bank was put in evidence by plaintiff. Marked Exhibit T. It is described in the testimony of Mr. Bush.

It contains the name of the payee of each draft drawn by the Elmira National Bank on the Chase National Bank from October 7, 1892, until the failure of the former bank.

[During said period the drafts entered are about 5,987 in number, running from number 19,999 to number 26,085, inclusive.] This book only shows two drafts in this period drawn to the order of J. J. Bush, namely, the draft of February 15, 1893, for $77.50, Exhibit No. 34, entered under date of February 16, 1893, and a draft for $30 entered under date of February 11, 1893. It also shows a draft entered under date of January 4, 1893, for $200, as to which the entry of the person to whom it is drawn reads "F. & M. Spencer, N. Y., for Bush." This book shows that on January 2, 1892, thirty-four drafts were drawn on the Chase National Bank and subsequently paid.

Defendant offers in evidence another of the six checks stated to be drawn for Philadelphia

drafts. Objected to on the same ground as to the check, Exhibit No. 50, and also on the ground that the check is irregular on its face as appears by comparing the dates, and on the ground that it affirmatively appears that all the drafts which can be found among the vouchers that were signed on that day were signed by Mr. Swan, and none of them by Mr. Bush. Objection overruled. Exception by plaintiff. Marked Exhibit No. 65. It is as follows:

**Exhibit No. 65.**

"ELMIRA, N. Y., Aug. 9th 1891. No.....
"ELMIRA NATIONAL BANK.

"Pay to the order of Dft on Philadelphia, J. J. B.
"$653.05 Six hundred fifty three /05 Dollars.
"J. J. BUSH."

Stamped across the face:
"Paid
"May 11 1891.
"Elmira, N. Y.
"ELMIRA NATIONAL BANK."

Deposition of J. J. BUSH aforesaid.—Further extracts were read by plaintiff's counsel in rebuttal as follows:

I became cashier of the Elmira National Bank about 1890 or 1891. About the beginning of 1891, Jackson Richardson became president of the bank. He is dead.

I remember the transaction of May 5, 1893, at the Chase National Bank, when I drew and certified a check for $15,012.50, and deposited $8,000 in cash and a $7,000 draft on the Quaker City Bank of Philadelphia. The $8,000 cash was money belonging to the Elmira National Bank. It was in bills, in the

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ordinary currency of the country. I got it from the vaults of the Elmira National Bank. My recollection is that the assistant cashier and myself put up the bundle together. We put up this currency in a bundle. It came from the vaults of the Elmira National Bank. Either I took it or my assistant, Mr. E. A. P. Smith. No doubt he took it by my direction. The book shown me endorsed "day book" is our daily counter book. The entries in that book were of all moneys received by the teller and of all moneys paid out by the teller. The moneys received were entered on one side and the moneys paid out were entered on the other side. It was balanced every night. $8,000 was entered here on the morning of May 5th, with the entry "The Chase National Bank" opposite. The entry is in the handwriting of my assistant cashier. I should hardly be able to say whether I saw it made or not, because it was a good while ago. I have no knowledge that it was made on that date except what the books show. I have no knowledge except that I see it in the book. I recognize the handwriting of the entry. It is Mr. E. A. P. Smith's. The entry is under the date of May 5th. The currency was taken by me on the night of May 4th after the end of business hours. Any transaction whereby the currency of the bank was increased or diminished after the closing hours of the bank, the entries relating to that transaction would be placed at the top of the page for the next day's business. The bank book was balanced each day as near after three o'clock as the teller was successful in obtaining his balance; as soon as he could prove his cash. I mean that at the close of the banking day, it was the duty of the teller to add up the items on one side of the day book and the items on the other, and strike a balance, and count his money to ascertain whether or not his balance was correct. That is what I mean by "prove his cash." Money taken after hours would be taken by myself or the assist-

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ant cashier, and we entered the items, whether we took it out or put it in, on the page for the next day's business. This day book was a book of original entry. This $8,000 was the bank's money. I had ownership or interest in it only as cashier.

Said entry was admitted in evidence and marked Exhibit V.

The testimony of William J. Kinsley on the former trial of this action was read by plaintiff (the witness' personal attendance being dispensed with by consent), as follows: He was an expert on questions where ink was at issue, and had made a special study of chemistry in its bearing on ink; that it is practicable to determine whether two inks are the same or not by chemical tests; that he had examined the $7,000 Philadelphia draft, Exhibit No. 1, and also the $15,012.50 check in suit, Exhibit C, both with the microscope and with chemical tests; that in his opinion the words "J. J. Bush, Cashier," on the face of the $7,000 check were both written with the same kind of ink; that the word "Cashier" on the middle line of the check was written with a different pen from the words "J. J. Bush" on that line, and at some subsequent time, but with the same kind of ink; that the words "J. J. Bush" were blotted paler than the other; that in his opinion the ink on the endorsement of that check was quite clearly in a different ink and in the same ink as the words "seven thousand" on the face of the check; that the $15,012.50 check is all the same ink, and that in his opinion the ink used to write the $15,012.50 check was used to write the words "seven thousand" on the other check and also the endorsement on that check.

Deposition of J. J. Bush.—Further extracts were read by plaintiff in rebuttal as follows:

Q. Now, I call your attention to this $7,000 draft on the Quaker City Bank, and I would like to

ask you whether, when you presented that to the Chase National Bank it was payable to your order as cashier? My present recollection of that occurrence has naturally become indistinct. On the trial before Mr. Justice Smith some years ago I gave my recollection at that time. I have not seen my testimony for a good while. I do not know just exactly what it was. I remember that I was a witness on the trial before Judge Smith soon after the bank failed (witness examined the stenographer's minutes of his testimony on said trial). That is my testimony. It brings back to me what my recollection was at the time of the trial. I do not know of having seen anything since that would make my recollection different from that testimony.

Q. Was that your recollection at the time you gave your testimony?

A. I should say that was my recollection, because that was my testimony.

It was intended to be at the time my best recollection. It was intended to be true most assuredly. I haven't any memory of that draft beyond the general memory that I would have from giving testimony in that trial and the trial previous to it. I was not able to testify to anything more definite than that I believed that the word "cashier" was there when I signed it at Elmira, and that I had no recollection of changing it afterwards.

CHARLES F. GALE, recalled by defendant for further CROSS-EXAMINATION, testified as follows:

There is no other charge of the $8,000 item in any book of the Elmira National Bank other than Exhibit V. There is an entry of $7,000 in the book as of the same date. I see an entry of "J. J. B. $7,000," on May 5. I find another entry of it on the same date, Quaker City Philadelphia credited. I see no reason to doubt that this refers to the same draft.

Said entry of "J. J. B. $7,000" was received in evidence and marked Exhibit No. 73. It is in

the column of debits against the Chase National Bank.

The corresponding entry of credit to the Quaker City Bank on the same date was received in evidence. Marked Exhibit No. 75. It says $7,000, with no initials opposite.

An entry in the column of debits to the Chase National Bank's account for May 5, 1893, being the line next above Exhibit No. 73, was admitted in evidence on behalf of plaintiff as Exhibit No. 76, "Cy. $8,000."

By Plaintiff's Counsel:

"Cy." stands for currency, I suppose. My knowledge of banking does not permit me to explain the letters "J. J. B." opposite the $7,000 entry. It says, J. J. B. That is all I know about it. I am a banker and have been for about a year assistant cashier of the City Bank of Binghamton. Before I was in the Receiver's office of the Elmira National Bank, I was bookkeeper in the Merchants' Bank of Binghamton. I have been engaged in banking for about fifteen years, and am familiar with the system of bookkeeping employed by the Elmira National Bank as they kept the books. I am able to state from my knowledge about that system that if an entry of any amount was made in the account of a correspondent bank, accompanied by the initials of one of the depositors, if that entry related to individual business of the depositor whose initials were set out there, an entry about that would in the ordinary course of business also appear in his own account for the same date. The book now shown me contains the accounts of the individual depositors. There is no entry of $7,000 on J. J. Bush's account on any day in the month of May, 1893, up to the date when the bank closed its doors, on either the debit or credit side.

Deposition of EMERSON J. BATTERSON, taken at Elmira on October 26, 1899, read in evidence by plaintiff as follows:

I reside in Elmira, New York. I was bookkeeper in the Elmira National Bank from March, 1892, until the bank went into liquidation. I was not employed by the receivers after that. In May, 1893, I had charge of the general ledger. The entries in the accounts of the Chase National Bank and the Quaker City National Bank of Philadelphia during that month are in my handwriting. The course of business as to these entries was as follows: The various items came to me in different ways and were put upon a spindle on my desk; the check was generally made for each item; sometimes an item was called to me by one of the clerks and I would make the charge generally, and items were on checks charged during the latter part of the day; this is the way I got the items. These entries are the first entries that were made in the books of the Elmira National Bank of these items on the general ledger. Some came from other books. They came from various sources. The one balance that came from any book was entitled draft record. The items that came from the draft record went under the head of credits. None of the other items were transferred from any other account of the bank except as to the entries from the draft record. This book was a book of original entry. The slips, I think, were bundled up and marked the day they were used and filed away. They were preserved always, I think. I do not know what became of them when the bank closed its doors. The last time I saw them, I don't remember whether I did them up. I probably did. They were kept under the desk under the counter with other vouchers and old papers. The initials "J. J. B." opposite this item of $7,000 on the Chase National Bank's account is in my handwriting. The initials were used to identify the item. They do not refresh my

memory so that I can state anything further in regard to this item than I have already stated. I received the amounts credited to other banks shown in these accounts in some way. I did not receive them personally. The only knowledge I had of them was that they were transferred from the books and from the oral statements made to me. The balances shown in these accounts were made up from my previous entries in these accounts. According to the course of business the balances appearing on the books of the Elmira National Bank on a given day would probably not be the same as the balances on the books of the correspondent bank on the same day. There would be many items in transit.

The letters "J. J. B." opposite the item of $7,000 on May 5th were to identify the item. The putting of these initials before the different items were to assist us in looking them up afterwards. I do not know what these initials indicated in this entry. They stood for J. J. Bush. I do not know whether the item represented a check or draft. If it did, I do not know in what relation J. J. Bush stood to that draft as appearing on the face of the draft. I cannot now tell from my own entry what I intended to indicate by these letters.

CHARLES F. GALE, recalled by plaintiff, testified as follows: When I came into possession of the papers, I found bundles of deposit slips. I searched through the slips in my possession to find the slips from which these entries of $8,000 and $7,000 were made. I did not find them. It was a thorough search through all the papers made at the request of my counsel.

Deposition of WILLIAM B. EDSON, taken at Elmira on October 26, 1899, read in evidence by the plaintiff.

I gave Mr. Batterson some of the items for entry in the general ledger. I gave them usually on a

slip as I called them off. There was not in the regular course of business a method by which I gave him a slip or called off the amount to him. The slips were placed with the deposit slips on that day. I last saw them on the day the bank failed. They were in the vault. I have a recollection as to the $7,000 which appears on the Chase Bank account of that day.

Q. Did you give that item to Mr. Batterson?

The answer was excluded on motion of defendant's counsel on the ground that it appeared by his subsequent cross-examination to be hearsay.

[PLAINTIFF RESTS.]

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Deposition of J. J. BUSH—further extracts read in evidence on behalf of defendant (from the examination by Mr. Whitney). I believe I had some individual moneys on deposit in the Elmira National Bank that were not entered, but there was no other account which any deposit I made could have gone into. The deposits which I think are not entered were on May 4, 5, and 6. I have made some discoveries in the last six months. I am looking it up. I have no information at present. I have no knowledge at first hand of it at present.

Q. A year ago you had no knowledge or information of any other moneys belonging to you that were not entered in that account?

A. Well, I knew that my account was not as it should be, but as to why I was unable to discover the reason.

Plaintiff moved to strike out this answer on the ground that it appears that it was entirely hearsay. Motion denied. Exception.

[DEFENDANT RESTS.]

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Plaintiff's Counsel: I understand that there is no question as to a verdict for the sum of $12.50, with interest for the plaintiff, but I understand that there are two defenses in mitigation of damages, one for $7,000 and the other for $8,000, with interest in each case.

I move for a direction of a verdict for the plaintiff for the full amount claimed for the reason that this transaction of May 5, 1893, is either one entire transaction, including those two deposits and the check, or is, as I claim it to be, two different transactions, one by which the moneys were deposited and the other by which the check was issued. In the latter case, of course, there is no defense. If the transaction is a single one, then, as has been held by the Court of Appeals in this case, it was an irregular transaction.

I make two claims: First, that there is no possible defense except by saying that this $8,000 and the $7,000 belonged to Mr. Bush, individually, or to some other person than the Elmira National Bank, which is not done. And in the second place, that the transaction being an irregular transaction, it was not in the ordinary course of business, and therefore not one in which Mr. Porter could take part without making inquiry. He is not protected by the rule that any transaction in the ordinary course of business protects a person who does not willfully shut his eyes to the facts. The transaction being irregular, it was the duty of a prudent man to make inquiry, and as Mr. Porter frankly states here that he made no inquiry whatever, the plaintiff is entitled to a verdict for the whole amount claimed.

Motion denied. Exception by plaintiff.

The Court then charged the jury as follows:

SHIPMAN, *J.*: Gentlemen of the Jury: This action was brought by the Receiver of the Elmira National Bank, which failed May 23, 1893, to recover from

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the Chase National Bank the sum of $15,012.50 and interest. The transaction occurred on May 5, 1893, and was of this sort.

Mr. J. J. Bush was the cashier of the Elmira National Bank. He had borrowed money of the Chase National Bank and had given his note for $25,000, payable at the Chase National Bank and secured by the stock of the Elmira Bank, which note had been reduced by payments to $15,000.

On the 4th day of May, 1893—which was, as you may perhaps recollect, during the time of the panic, commonly called the panic of 1893—the officers of the Chase National Bank telephoned to Bush that his collateral was not satisfactory and asked him to come down and settle the matter up, or improve the collateral. Mr. Bush came in response to this telephonic message on the morning of May 5th, bringing with him $8,000 in money and a draft of the Elmira Bank on the Quaker City Bank of Philadelphia for $7,000, which was originally made payable to the order of Bush individually or as cashier.

Bush said that with this money and draft he wished to take up his $15,000 note. Mr. Porter, the vice-president of the bank objected to the $7,000 draft on Philadelphia as there was delay with collections from Philadelphia, a panic in the money market, and some uncertainty about prompt collections from any Philadelphia bank. He said that as they wanted to use funds, and Philadelphia funds were not available to pay a note which was payable at the Chase National Bank, and therefore payable in New York funds, a different arrangement must be made. He asked Mr. Bush if he had a personal account with the Elmira National Bank and he said he had. Mr. Porter then suggested to him that he, Bush, should put the money to the credit of the Elmira National Bank and the $7,000 draft in its collection account, and that he should make a personal check for $15,012 50, the amount of the note and interest, on the Elmira

National Bank, payable at the Chase National Bank so that it would be in New York funds.

Mr. Voorhees, one of the clerks in the Chase National Bank, then brought the form which is ordinarily used in making such a draft, and Porter made it out and Bush signed it individually as maker, and certified and accepted it as cashier, and left the $7,000 draft and the money.

The check for $15,012.50 was immediately charged to the Elmira Bank and the currency was credited to it. The $7,000 Quaker City draft was nominally taken for collection and was collected and credited to the Elmira Bank on May 8th. The note and collateral were left with the defendant for safe keeping.

No notice of this transaction was given by Porter to the Elmira Bank, but this charge of $15,012.50 appeared on the defendant's account, which was rendered, after the failure of the Elmira Bank on June 6, 1893, to the Receiver, who brought this suit to recover the amount. The $8,000 in currency was embezzled by Bush from the Elmira Bank, and the use of the $7,000 draft was also an embezzlement.

If the transaction rested entirely upon the fact that Mr. Porter received this certified check for $15,012.50 in payment and discharge of Bush's individual debt, there would have been no doubt as to the illegal character of the transaction and of its invalidity as against the Elmira Bank, because Mr. Porter took in payment of Bush's debt his individual check upon the Elmira Bank, payable at the Chase National Bank, which was certified by Bush as cashier. There is no evidence tending to show that Bush had any real or apparent authority for this certification or to make the check payable at the office of the defendant. The certification was invalid because it was the certification of the cashier's individual check given and received for his individual benefit, with no authority either to certify it or to make it payable elsewhere than at the office of the Elmira National Bank.

The certification by a cashier of his own individual

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check is void, irrespective of the question whether he had funds in the bank to meet it, for he could not act in regard to the same check in two capacities, both as drawer and as endorser, to bind the bank for its payment.

The importance of this case turns upon another set of facts to which I will now call your attention. You will see that Bush, as cashier, certified his own individual check for $15,012.50, and that he left the currency, $8,000, and the Quaker City draft for $7,000. Consequently, whatever is to be found about the liability of the defendant to repay $15,000, there is no question that it is liable to repay $12.50 and interest from May 5, 1893, and your verdict will be for the plaintiff for that sum at least.

The questions in the case beyond the $12.50 are in regard to the right of the Chase National Bank to retain the $8,000 in currency and the $7,000 draft. You will see that, with the exception of this $12.50, I put the case as though when Bush came in with his bag containing $8,000 in currency and $7,000 in a draft, those two, the currency and the draft, had been received by Porter and credited upon the note, and this form, this illegal, improper form of taking Bush's individual check and having it certified by himself as cashier, had not been gone into.

The questions in the case beyond the $12.50 are in regard to the right of the Chase National Bank to retain the $8,000 in currency and the $7,000 draft. Now, this money, this currency, was without question taken by Bush from the vaults of the Elmira bank without authority, and was its property, but inasmuch as it was currency or money, bank bills, if it was received by the defendant in good faith, in due course of business and for the payment of a valid debt, the defendant is not subjected to the risk of repayment to the person from whom it was illegally obtained.

That principle is well settled and it is settled because it is regarded as necessary in business that when currency has been offered by one man to an-

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other who is his creditor, the creditor can retain the currency if he received it in good faith, in due course of business and for the payment of a valid debt, although those bills have been stolen from somebody else, but the question is in regard to the good faith of the recipient.

This, of course, applies particularly to the $8,000 but it is also true that if both the Quaker City draft and the $8,000 were received in bad faith with knowledge, or with adequate reason to know that Bush was delivering the property of another which he had illegally and wrongfully obtained, then the Chase National Bank cannot retain the proceeds of such fraudulent conduct by its vice-president.

But the plaintiff in attempting to establish bad faith, takes the burden of proof and you are to examine the circumstances of the case, mindful that Mr. Porter has testified to his good faith, and see whether the circumstances are such as to satisfy you that his testimony is not sustained by the facts, or that the facts are such as to satisfy you that, notwithstanding his testimony, he acted in bad faith.

What were the facts to justify this act? It was a time of business panic of extreme character. The Chase National Bank telephoned to Mr. Bush that he must pay his debt or deposit more satisfactory security. That message was sent to Elmira in the afternoon. Bush appears the next morning with $8,000 in his bag. The plaintiff says that it was very unlikely that an individual would have $8,000 of his own in currency which he could produce immediately; that the fact that a bank cashier appears with $8,000 in currency to pay his own debt is a fact which should suggest fraud and embezzlement; that if he owned that amount or had that amount in currency it would be natural for him to deposit it and bring the amount in his individual check rather than be subjected to the risk of loss in transit.

Furthermore, the plaintiff says that the fact that he brought the Quaker City draft, drawn by himself

as cashier, to pay his own debts was another suspicious circumstance, and that the conduct of Mr. Porter in having everything placed to the credit of the Elmira Bank and getting the Elmira Bank's certification of Bush's check, shows an indisposition to receive the $8,000 from Bush as an individual, and that the reason given by Mr. Porter for the form in which the business was done is an inadequate excuse.

Then there has been some testimony, upon which comment was made, that the Quaker City draft was originally made to the order of Bush as cashier. You will recall that Mr. Porter says that that check was made to the order of Bush, but when Bush turned the check over and endorsed it, he endorsed it as J. J. Bush, Cashier, following the ordinary habit of a man to use the name which he had been accustomed to use, and then when it was turned back it was seen that he had endorsed it as cashier, whereas it was payable to his own order, and that the word "Cashier" was afterwards written.

Now Bush thinks, although he is not very strong in it, the other way. All I have to say to you on that point is, if the draft was originally to the order of Bush as cashier it would have been a singular circumstance, because the draft itself would have shown upon its face that it was the property of the Elmira Bank. I do not think myself, gentlemen, that there can be be very much question in regard to this fact. I think undoubtedly the testimony of Mr. Porter is correct on this point. It is more positive than anybody else's testimony, and it seems to me to be supported by the probabilities.

And now, while I am on that question, whether the face of that draft was to the order of Bush or to the order of Bush, cashier. If you find upon the question of bad faith that there was no bad faith, I do not think that the fact of the alteration of the check or the addition of "Cashier" upon the face of the check will be of any importance to your further consideration of the case, because I think

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the question whether that addition was made or not is of principal importance in regard to the good faith of the transaction.

Now, what is on the other hand? The defendant says that there were no facts in the case to suggest to Mr. Porter any suspicion when he had telephoned to Bush to come down and give additional security or settle, and he came down; that Bush's position was that of one of responsibility; that his character was, so far as Porter knew, high; that he came promptly; that he appeared well; that there was no apparent worriment in his mind; that the business was done quietly; that there was nothing to suggest to his mind, and it did not occur to him that the circumstances which seem most suspicious should seem suspicious to him; that he did not think anything about it, and that not thinking that there was anything wrong, there was no occasion for him to make any inquiry.

If you find that the $8,000 in currency was received in good faith you will, as a matter of course, find that the $7,000 draft was also received in good faith.

Now, we come to the question in regard to the $7,000 draft, which is the one upon which most time has been occupied, and that depends upon this principle of law.

In the absence of any authority in the cashier to draw cashier's drafts to his own order in payment of his individual debts, the person who receives such a draft in payment of a cashier's individual debt takes the risk of being obliged to pay the draft to the bank. The case proceeds upon that principle which is the same principle that I have already told you about in regard to the improper certification by a cashier of his own check. If a cashier has no authority to issue a cashier's draft to his own order in payment of his own debts the creditor who takes such draft takes the risk of a cashier's lack of authority, although he may have had individual funds upon deposit.

The general authority of the cashier to draw drafts or checks on the bank in the conduct of his business does not by itself permit him to draw such drafts or checks in payment of his personal debts, or to raise money for the transaction of his personal business. When, therefore, he draws a draft or a check on the bank payable to his own order, and for his own individual debt, the party acting thereon takes the risk that he may act without authority to do so.

Now we come to the other side of the principle. But, if it appears that the agent had repeatedly done such acts on previous occasions, and that such acts had been ratified and not repudiated by the officers of the corporation, then, providing such acts have been done for a period sufficiently long to establish a settled course of business, it may be inferred from the general manner in which they have been done that such acts were known, or ought to have been known, by the directors, and that the cashier had authority.

The question in this case does not turn upon an express authority conferred upon Bush by his Board of Directors to use the funds of the Elmira Bank for his personal benefit, or to draw cashier's drafts to his own order, because there was no such expressed authority, and there is no evidence that the Board of Directors actually knew that Bush was pursuing this line of conduct.

The question turns upon an implied authority, which is to be inferred from the proved acquiescence of the Elmira Bank in Bush's prior assumption of authority.

The authority of a cashier may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of a corporation as represented by its Board of Directors. When, during a series of years, and in numerous business

transactions, he has been permitted, without objection, and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between his bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operation. His authority is to be implied from the acquiescence of the directors in permitting an officer during a series of years to pursue a particular course of conduct, and this acquiescence is derived from their actual knowledge or from what should have been their knowledge of the conduct of the course of business of the officers. In this case no actual knowledge has been proved, but the point in the case is the inference to be derived from what the directors should have known by a proper examination of the course of business of their cashier.

Testimony in regard to this point, this course of business of the cashier, has been presented in a mass of papers. The trouble or difficulty in a jury's ascertainment of a fact of this sort is because a mass of papers must necessarily be presented, and must be presented to you sitting in a box, without an opportunity to study them, to make memoranda or to analyze the facts which they may show. The difficulty is that when, after a long trial, a mass of papers has been presented to the jury they cannot recollect the dates or the amounts, and without an opportunity of classifying the facts which they show, clearness of memory cannot reasonably exist. Therefore, I must take some pains to summarize the facts which have been presented to you.

Upon the former trial of this case in this Court nine drafts from October, 1892, to May, 1893, five of them to the order of creditors, and amounting in all to $2,630, were shown. Three of these drafts given to the order of creditors were the Grider draft for $600; $500 to the Mutual Life Insurance Company, and $300 to the Central Trust Company, and

two for about $150, in all to the order of the Chase Bank.

The Court of Appeals said that those nine drafts, five of them for $1,550 to the order of third persons, and $2,630 in all were not sufficient to establish a settled course of business during the series of years. A draft given to the order of creditors by the cashier does not disclose that that draft was in payment of his own private debt, and an auditing committee when they came to look at such a draft, would not know that Bush had given it for his own purposes because they would not know that Greider was his individual creditor or that the Mutual Life Insurance Company was, or that the Central Trust Company was.

Three of these nine drafts, amounting to $1,000, were upon the Bank of North America. Upon this trial those three drafts turned out to have been in the Elmira Bank's business. Of those nine drafts which have been presented here five of them were to creditors and three of them, to the amount of $1,000, were in the bank's business. If this testimony had stopped there the implied authority would have been weakness itself and we should have been just where the Court of Appeals said we were. Additional cashier's drafts to the order of Bush, and for his personal benefit, have been proved on this trial, eight in number, from February, 1891, to February, 1893, amounting in all to $594.24. These eight drafts are each for comparatively small sums, running from $170 to $5. If this evidence had been the only additional evidence of Bush's course of business from which implied authority was to be inferred it would have been entirely, in my opinion, inadequate to establish an implied authority to Bush to use the bank's funds for the payment of his own debt. Other additional evidence, new evidence, has been introduced upon this trial, which consists of checks signed by Bush bearing upon their face the statement that they were drawn for drafts to his order

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or for his drafts, which drafts were not also in evidence.

These checks for which no drafts have been found—I am not now speaking of those checks for which drafts have been found and which are included in the eight already mentioned—these checks for which no drafts have been found are nine in number; six made in 1891 and three in 1892, amounting in all to $4,258 34. Three of those drafts, drawn in January, 1891, upon Philadelphia banks for $669.91, for $400 and for $552.55, and one in January, 1892, for $100 upon the Chase National Bank, are said by Bush to be upon the bank's business; so that those three checks and also one for $653.05 upon a Philadelphia bank may be laid out of the case, which leaves those checks amounting in all to $2,375.51. The checks which have been produced amounted to $4,258.34; and deducting those I have just mentioned, amounting to $2,375, leaves in round numbers $2,000. That leaves six checks, one of which is for $769.63. The purpose for which this check for $769.63, of June, 1892, upon the Chase National Bank, was drawn, the draft not having been found, Bush does not remember. It may have been for his private business or for something else. It is not carried in his memory, whatever it was for. Now, the knowledge of this alleged course of business by Bush, no conversation ever having been had on the subject by him with the directors of which any testimony has been given, must have been gained by knowledge which they ought to have gained by an inspection of the books or of the drafts themselves.

If the drafts were not signed by Bush as cashier they do not disclose his exercise of authority. The plaintiff, therefore, says that these drafts, they not being here, might have been signed by Swan, the assistant cashier, and that there is no proof that they were actually signed by Bush. He introduces evidence in regard to the drafts of $653.91, and says that all the checks which were issued to the Chase

National Bank upon the date of the draft, to wit, May 11th, were signed by Swan, and that it is a fair inference that Bush was absent.

Mr. Whitney: I think that is one your Honor charged they ought not to take into consideration.

The Court: That $653.91 draft was withdrawn. So also there are three checks, one for $100 and two for $306.67 each, which were for drafts issued on days when Swan and Bush were each signing drafts.

Now, you must not infer from what I have said that I have divided this testimony into sections and say one does not prove an adequate authority and the second does not prove an adequate authority, and leave to you the question whether the third section of itself proves authority, because the testimony. both that upon the former trial, and the proof introduced on this trial, and the checks produced by Bush evidential more or less of drafts which he says were made to his order for his individual purpose, are all to be taken together and considered by you, and you are to ascertain from them all whether they show a settled course of business during a series of years, or that in numerous business transactions Bush was permitted to draw cashier's drafts to his own order in payment of his private debts, and I am of the opinion that you should require clear proof to satisfy you that the directors had by their acquiescence or by their laches in not ascertaining what they ought to have ascertained, permitted Bush to exercise this authority.

In addition to this testimony of the paper there is also Bush's general testimony. His deposition, you recall, is a very exhaustive one in length in which he says that he made no difference between these drafts to his own order and those drawn to the order of any other purchaser or depositor and that this practice of paying his debts with cashier's drafts to his own order was commenced when he became cashier, or in the very early part of his official connection with the bank.

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This testimony is, of course, to be considered by you, but I do not regard general testimony of this sort to be as significant as the papers which show the exercise of authority. I think the papers are better evidence than general declarations of power by the one who exercises it. Bush's testimony upon all points is to be taken into consideration, but I think that your attention should be carefully directed to the evidence which appears by all papers in the case. Now the papers of Bush, and of the Elmira Bank and the Chase Bank have been so thoroughly investigated by the counsel on both sides that I think you may well believe that all the papers pertaining to Bush's drafts to his own order, that is, all papers of one form or another, either checks or drafts, have been searched out. Of course, the drafts have not been found. I mean that the papers of both kinds have been searched out, and that you have about the whole story. If you find for the defendant upon the $8,000 and the $7,000 items, your verdict will be for the plaintiff for only $12.50 and interest. If you find upon either point, on the $8,000 or on the $7,000 for the plaintiff, of course, that amount, with interest, is to be added to the $12.50.

Mr. Whitney: I think your Honor has charged that the Philadelphia checks should not be taken into consideration.

The Court: That is true.

Mr. Whitney: And that would also apply to this Bank of North America check?

The Court: Yes.

The plaintiff's counsel took severally the following exceptions to the foregoing charge in the presence of the jury.

(1.) To the charge that the importance of the case turns upon another state of facts than the certification of the $15,012.50 check.

(2.) To the charge that the case stands as if when Bush came in, the $8,000 and the $7,000 draft had

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been received by Porter and credited upon the note, and the subsequent form had not been gone into.

(3.) To the charge that if received in good faith and in due course of business, and in payment of a valid debt the defendant is protected, plaintiff claiming that this was not a case of due course of business, but was an irregular transaction.

(4.) To the charge that the plaintiff has the burden of proof on the issue of bad faith.

(5.) To the charge that the testimony of Mr. Porter was entitled to credit on the point of time when the word "Cashier" was written on the face of the draft.

(6.) To the submission to the jury of the question whether Bush's habit ought to have been known to the Board of Directors of the Elmira National Bank.

(7.) To the charge that the case turns upon an implied authority to Bush, there being no proof that the directors knew of his acts.

(8.) To the charge that authority may be implied by acquiescence either from actual knowledge or what should have been the knowledge of the directors.

(9.) To the charge that the jury might take into consideration Bush's testimony as to signing drafts to his own order.

The following rulings were made by the Court and exceptions taken by plaintiff's counsel in the presence of the jury, upon the plaintiff's requests to charge, which had been theretofore duly submitted:

Plaintiff's request 1. "Plaintiff is entitled to a "verdict for the amount of $7,012.50, with interest

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"thereon from May 5, 1893, at the rate of 6 per "cent per annum."

The Court refused to charge except as charged, and plaintiff's counsel excepted.

Plaintiff's request 5: "If the jury find that the "transaction of May 5, 1893, as testified to by Mr. "Porter, was not in the ordinary course of business, "then they must find a verdict for the plaintiff in "the full amount claimed, unless, they are also of "the opinion that the circumstances were not such "as would lead a man of ordinary prudence in "Porter's position to make inquiry about the "ownership of the currency."

The Court refused to so charge except as charged, and plaintiff's counsel excepted.

Plaintiff's request 9: "If the jury find that Porter "willfully shut his eyes to the fact that this cur- "rency belonged to the Elmira National Bank, de- "fendant must fail as to this defense, and plaintiff "is entitled to a verdict for the full amount "claimed."

The Court refused to so charge except as charged, and plaintiff's counsel excepted.

Plaintiff's request 10: "If the jury find that "Porter's ignorance of the true ownership of this "currency was not merely negligent, but willful, "defendant must fail as to this defense, and plain- "tiff is entitled to a verdict for the full amount "claimed."

The Court refused to so charge except as charged, and plaintiff's counsel excepted.

Plaintiff's request 11: "If the jury find that Por- "ter's suspicions were aroused as to the true owner- "ship of this currency, then, since he failed to make "any inquiry, defendant must fail as to this de- "fense, and plaintiff is entitled to a verdict for the "full amount claimed."

The Court refused to so charge except as charged, and plaintiff's counsel excepted.

Plaintiff's request 12: "The jury are not bound "to believe Porter's testimony upon any point not

"conceded by the plaintiff, even where the testi-
" mony is uncontradicted."

The Court refused to so charge except as charged, and plaintiff's counsel excepted.

Plaintiff's request 13: "As bearing upon this de-
" fense the jury are entitled to take into considera-
" tion the large amount of the currency which
" Bush tendered in payment of his individual debt."

The Court refused to so charge except as charged, and plaintiff's counsel excepted.

Plaintiff's request 14: "The certification of the
" $15,012.50 check by Bush was a crime under the
" laws of the United States, and this was known,
" or ought to have been known, to both Bush and
" Porter."

The Court refused to so charge except as charged, and plaintiff's counsel excepted.

Plaintiff's request 15: "If the jury find that when
" Bush brought in the $7,000 draft it was payable
" to 'J. J. Bush, Cashier,' then it was on its face
" the property of the Elmira National Bank, and if
" they find that under these circumstances the sus-
" picions of an ordinarily prudent man would have
" been aroused as to whether the $8,000 was also the
" property of the bank, then, since Porter failed to
" make any inquiry as to its ownership, the defend-
" ant must fail as to this defense, and the plaintiff
" is entitled to a verdict for the full amount
" claimed."

The Court refused to so charge, except as charged, and plaintiff's counsel excepted.

Plaintiff's request 23. "The jury are not to take
" into consideration Bush's check of September 30,
" 1891, for $306.67."

The Court refused to so charge, except as charged, and plaintiff's counsel excepted.

Plaintiff's request 24. "The jury are not to take
" into consideration Bush's check of December 31,
" 1891, for $306.67."

The Court refused to so charge, except as charged, and plaintiff's counsel excepted.

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Plaintiff's request 26. "The jury are not to take "into consideration Bush's check of June 6, 1892, "for $769.03."

The Court refused to so charge, except as charged, and plaintiff's counsel excepted.

Plaintiff's request 28. "The jury are not to take "into consideration the draft of March 1, 1893, on "the Hide and Leather National Bank in favor of "M. L. Greider for $600."

The Court refused to so charge, except as charged, and plaintiff's counsel excepted.

Plaintiff's request 29. "The jury are not to take "into consideration the draft of March 31, 1893, on "the Chase National Bank to the order of the "Mutual Life Insurance Company for $500."

The Court refused to so charge except as charged, and plaintiff's counsel excepted.

Plaintiff's request 30. "The jury are not to take "into consideration the draft of April 3, 1893, on "the Chase National Bank to the order of Central "Trust Company for $300."

The Court refused to so charge except as charged, and plaintiff's counsel excepted.

Plaintiff's request 34. "The burden is upon the "defendant to establish by a preponderance of evi- "dence that there was a well settled course of busi- "ness in the Elmira National Bank authorizing "Bush to draw drafts as cashier to his own indi- "vidual order, without regard to amount, and that "this course of business was actually known to the "directors of said bank; if defendants have failed "to prove this by a preponderance of evidence, the "jury must find a verdict for the plaintiff upon this "issue."

The Court refused to so charge except as charged, and plaintiff's counsel excepted.

Plaintiff's request 35. "The jury are not to take "into consideration any one of the prior drafts or "checks which are in evidence, unless they find "that defendant has established by a preponderance "of evidence that the directors of the bank knew

" that a draft was then issued by Bush for his indi-
" vidual benefit, and signed by himself."

The Court refused to so charge except as charged, and plaintiff's counsel excepted.

Plaintiff's request 36. " If the jury in the case of
" any one of these prior checks or drafts find that
" the amount is too small to constitute a precedent
" for the subsequent issuance of a $7,000 draft by
" Bush as cashier to his individual order for his in-
" dividual benefit, and then such check or draft
" must be left out of consideration."

The Court refused to so charge except as charged, and plaintiff's counsel excepted.

The jury then retired and subsequently rendered a verdict for the plaintiff for the sum of $12.50, with interest at 6 per cent. from May 5, 1893.

Upon application of the plaintiff this bill of exceptions, having been duly settled according to the provisions of Rule 69 of this Court, is allowed by me and ordered to become a part of the record in this cause at the term aforesaid, and to be filed *nunc pro tunc* as of the 26th day of October, 1900.

N. Shipman
Circuit Judge

Approved
Reed Simpson Thacher & Barnum,
Attorneys for Defendant.
Goodrich Whitney & Hagen,
Attorneys for Plaintiff

13875

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CHARLES F. GALE, as Receiver of the Elmira National Bank, Plaintiff,

AGAINST

THE CHASE NATIONAL BANK, Defendant.

Assignment of Errors.

And afterwards, to wit, at the same term at which the above entitled cause was tried and judgment therein rendered, comes the plaintiff aforesaid and says that in the record and proceedings in the above entited cause there is manifest error in each and every one of the following rulings of the Court, to wit:

I.—In permitting the defendant to ask the witness William H. Porter, over objection by plaintiff as incompetent and not binding upon the Elmira National Bank, the following question: "Can you give the substance of what took place between Mr. Bush and yourself at that time [May 5, 1893]"? The witness answered in the affirmative; and the substance of the evidence admitted was that the witness and Bush agreed that the latter should deposit $15,000, not stated to belong to him, in the account of the Elmira Bank with defendant, and draw and certify the check described in the complaint.

II*a*.—In permitting the defendant to read from the deposition of the witness J. J. Bush, over objection by plaintiff as immaterial and incompetent, the

following question: "And from that time [*i. e.*, early in 1891 when Mr. C. E. Selover left the bank], who were the controlling persons in that bank?" to which the witness answered, "Col. D. C. Robinson and Mr. Jackson Richardson. The stock that they were holding and purchased represented a majority of it."

*b.* In denying plaintiff's motion to strike out as immaterial and incompetent the second and last sentence of said answer, beginning with the words "The stock."

III.—In permitting the defendant, over objection by plaintiff as immaterial and incompetent, to read from the deposition of the witness J. J. Bush the following question: "The stock that stood in your name, together with that in Mr. D. C. Robinson's name, was a controlling interest in the stock, was it not?" to which the witness answered, "It was at the last days of the bank, very nearly a controlling interest, I should say."

IV.—In permitting the defendant, over objection by plaintiff that it was immaterial whether or not there were overdrafts in his [Bush's] account, to read from the deposition of the witness, J. J. Bush, the following question: "Now, as matter of fact, did the books of the bank show overdrafts in your account?" to which the witness answered, "I should say that the books of the bank showed my account overdrawn from time to time, as it would any other customer's."

V.—In permitting the defendant to read from the deposition of the witness, J. J. Bush, over objection by plaintiff on the ground that it was immateria whether or not there were overdrafts in his account, the following question: "I am not asking as to whether the account was actually overdrawn, but as to whether it appeared on the face of the books of

the bank that it was overdrawn?" to which the witness answered, "Yes, sir; the same as any other man's account."

VI.—In permitting the defendant to read from the deposition of the witness, J. J. Bush, over objection by plaintiff on the ground that it was immaterial whether or not there were overdrafts in his account, the following question: "And was there any attempt to conceal your overdrafts ever made by you?" to which the witness answered, "No, sir; never."

VII.—In permitting the defendant to read from the deposition of the witness J. J. Bush, over objection by plaintiff on the grounds hereinafter stated, the following question: "Mr. Bush, you drew other drafts as cashier of the Elmira National Bank to your own order besides the $7,000 Quaker City draft which has been mentioned, did you not?" to which the witness answered, "Yes, sir." The above question was objected to on the following grounds: (1) As immaterial and incompetent as against the Elmira National Bank; (2) that it cannot be any evidence of a course of business, because it does not appear that any of them came to the attention of any of the directors of the bank; (3) that it is no evidence of any course of business, because the directors of that bank could not lawfully have given Bush any general power to issue drafts in his own favor for his individual debts; (4) because no evidence as to prior drafts to Bush's individual order would justify the draft in question, which is admitted to have been payable to Bush as cashier, that is, to the Elmira National Bank, when received by the defendant; (5) that the defendant was put on notice and inquiry as to the true ownership of the $7,000 draft by this endorsement by Bush as cashier, and as it made no inquiry it is not in a position to appeal to any course of business as to drafts to Bush's individual order, were it conceded that such

a course of business existed; (6) that the defendant, by presenting this $7,000 draft for payment to the Philadelphia bank represented to that bank and to the Elmira National Bank that it represented a mere transfer of funds of the Elmira Bank from Philadelphia to New York, and is estopped to assert the contrary; (7) on the ground that the whole transaction testified to by Porter was irregular and outside of any course of business, and that, therefore, cannot be sustained by any proof as to a course of business; (8) that the only evidence by which the defendant could to any extent be relieved from liability to repay the whole amount would be evidence that the $15,000, or some part thereof, was not the property of the Elmira NationalBank, and that is neither pleaded nor proved.

VIII.—In permitting the defendant to read from the deposition of the witness J. J. Bush, over objection by plaintiff as immaterial, the following question, "Was any objection ever made to your drawing such drafts [as cashier in his own favor]?" to which the witness answered, "No, sir."

IX.—In permitting the defendant to read from the deposition of the witness J. J. Bush, over objection by plaintiff as immaterial, the following question: "Was any objection ever made to your drawing drafts to your own order?" to which the witness answered, "No, sir."

X.—In permitting the defendant to read from the deposition of the witness J. J. Bush, over objection by plaintiff as immaterial, and not confined to drafts to his own order, the following question: "And from that time on whenever you wanted a draft in your own business you drew it?" to which the witness answered, "Yes, sir."

XI.—In permitting the defendant to read from the deposition of the witness J. J. Bush, over objection

by plaintiff as immaterial, and that not any of these drafts came to the knowledge of the directors of the bank, the following question: "Was any objection ever made by any one to the issuing or using of any of these drafts?" to which the witness answered, "Not that I ever heard of."

XII.—In receiving in evidence, over objection by plaintiff that it is immaterial, that it never came to the knowledge of the directors of the bank, and that it is for too trivial an amount to form any precedent for a draft of $7,000, the draft of the Elmira National Bank on the Chase National Bank, signed by J. J. Bush, cashier, to the order of J. J. Bush, for $170.83, marked Exhibit 4.

XIII.—In receiving in evidence, over objection by plaintiff that they are immaterial, that they never came to the knowledge of the directors of the bank, that they are far too trivial amounts to form any precedent for a draft of $7,000, the following drafts of the Elmira National Bank on the Chase National Bank, each signed by J. J. Bush, cashier, to the order of J. J. Bush, each being separately objected to and separately assigned for error:

(*a.*) The draft for $129.17, marked Exhibit 5.
(*b.*) " " " $96.67, " " 6.
(*c.*) " " " $35.07. " " 7.
(*d.*) " " " $50, " " 8.
(*e.*) " " " $100, " " 9.
(*f.*) " " " $30, " " 10.

XIV.—In receiving in evidence, over objection by plaintiff that it is immaterial, that it never came to the knowledge of the directors of the bank, and that it is for too trivial an amount to form any precedent for a draft of $7,000, the draft of the Elmira National Bank on the Chase National Bank, signed by J. J. Bush, cashier, to the order of J. J. Bush, for $5, marked Exhibit 11.

XV.—In denying plaintiff's motion to strike out from the evidence Defendant's Exhibit 9 (being draft of the Elmira National Bank on the Chase National Bank, No. 13,318, dated January 15, 1892, signed by J. J. Bush, cashier, to the order of J. J. Bush, for $100), on the ground that it was used for the purpose of the Elmira National Bank, and not for the witness' personal benefit.

XVI.—In permitting the defendant to ask the witness, J. J. Bush, over objection by plaintiff as immaterial, the following question: "Who were the controlling persons in the management of the Elmira National Bank actually?" to which the witness answered, "Mr. Richardson, Mr. Robinson and myself had more to do with the running of this bank than any of the others."

XVII. –In permitting the defendant to ask the witness, J. J. Bush, over objection by plaintiff as immaterial, and also as too general and asking for conclusions of the witness, the following question: "As a matter of fact was your management of the bank interfered with by any one in any way?" to which the witness answered, "I think that my management of the affairs of the bank was so generally in accord with the management of the bank that no one interfered with me, either in my conduct, or the way I performed my duties in the bank."

XVIII.—(*a.*) In receiving in evidence, over objection by plaintiff, that they were immaterial and not connected with the case, the drafts of the Elmira National Bank drawn on the National Bank of North America, each signed by J. J. Bush, cashier, and drawn to the order of J. J. Bush individually, the dates and amounts of which are as follows: One of October 5, 1893, for $300; another of the same date for $200; and one of December 13, 1892, for $400, marked respectively Exhibits 30, 31 and 32.

(*b.*) In denying plaintiff's motion to strike out said three drafts, on the ground that they were used for the benefit of the bank.

XIX.—In receiving in evidence, over objection by plaintiff that they were immaterial, and on the ground that the draft was not drawn to the order of J. J. Bush, and did not indicate on its face that it was drawn in his private business, a check of J. J. Bush on the Elmira National Bank, dated February 28, 1893, to the order of "Dft. to order M. L. Greider" for $600, and a draft of the Elmira National Bank on the Hide and Leather National Bank, No. 643, dated March 1, 1893, signed by J. J. Bush, cashier, to the order of M. L. Greider for $600, marked respectively Exhibits 36 and 35.

XX.—In receiving in evidence, over objection by plaintiff that they were immaterial, and on the ground that the draft was not drawn to the order of J. J. Bush, and did not indicate on its face that it was drawn in his private business, check of J. J. Bush on the Elmira National Bank, dated March 31, 1893, to the order of "Dft. Mutual Life Insurance Company" for $500, and draft of the Elmira National Bank on the Chase National Bank No. 24,580, dated March 31, 1893, signed by J. J. Bush, cashier, to the order of Mutual Life Insurance Company for $500, marked respectively Exhibits 39 and 38.

XXI.—In receiving in evidence, over objection by plaintiff that they were immaterial, and on the ground that the drafts were not drawn to the order of J. J. Bush, two drafts dated April 3, 1893, of the Elmira National Bank, on the Chase National Bank, one to the order of the Central Trust Company for $300, and another to the order of the Chase National Bank for $77.50, both signed by J. J. Bush as cashier; also a check of the same date on the Elmira National Bank signed by

J. J. Bush to the order of "Dfts. on New York Central Trust Company $300, Chase National Bank $77.50, $377.50," marked respectively Exhibits 48, 47 and 3.

XXII.—In receiving in evidence, over objection by plaintiff that the witness has testified that they were for the benefit of the Elmira National Bank, and that it does not appear that the drafts issued for said checks were signed by Bush, checks on the Elmira National Bank, signed by J. J. Bush; one dated January 3, 1891, to the order of defendant to order J. J. Bush for $669.91, marked Exhibit 50, and another dated April 15, 1891, to the order of defendant to J. J. Bush for $552.55, marked Exhibit 53.

XXIII.—In receiving in evidence, over objection by plaintiff that it does not appear that the drafts issued for said checks were signed by Bush, and on the ground that it does not sufficiently appear that any of the drafts drawn for said checks were to the order of Bush, checks on the Elmira National Bank, signed by J. J. Bush, one dated August 31, 1891, to the order of defendant to J. J. Bush for $100, marked Exhibit 54; another dated September 30, 1891, to the order of defendant to order J. J. Bush for $306.67, marked Exhibit 55; another dated December 31, 1891, to the order of defendant to J. J. Bush for $306.67, marked Exhibit 56; another dated June 6, 1892, to the order of defendant to J. J. Bush for $769.03, marked Exhibit 60.

XXIV.—In receiving in evidence, over objection by plaintiff that the witness has testified that it was for the benefit of the Elmira National Bank, and that it does not appear that the draft issued for said check was signed by Bush, check on the Elmira National Bank signed by J. J. Bush 3/5, 1891, to the order of Philadelphia to J. J. Bush for $400, marked Exhibit 64.

XXV.—In receiving in evidence over objection by plaintiff that the witness has testified that it was for the benefit of the Elmira National Bank, that it does not appear that the draft issued for said check was signed by Bush, that the check is irregular on its face as appears by comparing the dates, and that it affirmatively appears that all the drafts which can be found among the vouchers that were signed by Mr. Swan and none of them by Mr. Bush, check on the Elmira National Bank, signed by J. J. Bush, dated Aug. 9th, 1891, to the order of Dft. on Philadelphia, J. J. B., for $653.05, marked Exhibit 65.

XXVI.—In denying plaintiff's motion to strike out on the ground that it appears that it was entirely hearsay, the answer to the following question: "A year ago you had no knowledge or information of any other moneys belonging to you that were not entered in that account?" Said answer is as follows: "Well, I knew that my account was not as it should be, but as to why I was unable to discover the reason."

XXVII.—In denying plaintiff's motion at the close of the testimony herein for the direction of a verdict for the plaintiff for the full amount claimed.

XXVIII.—In charging the jury as follows (after instructing them as to the illegality of the $15,012.50 check): "The importance of this case turns upon another set of facts to which I will now call your attention."

XXIX.—In charging the jury as follows: "I put the case as though when Bush came in with his bag containing $8,000 in currency and $7,000 in a draft; those two, the currency and the draft, had been received by Porter and credited upon the note, and this form, this illegal, improper form of taking

Bush's individual check and having it certified by himself as cashier, had not been gone into."

XXX.—In charging the jury as follows with relation to the $8,000 currency: "If it was received by the defendant in good faith, in due course of business and for the payment of a valid debt, the defendant is not subjected to the risk of repayment to the person from whom it was illegally obtained."

XXXI.—In charging the jury as follows: "But the plaintiff in attempting to establish bad faith takes the burden of proof."

XXXII.—In charging the jury as follows as to the question whether the word "cashier" was added to the name of the payee on the $7,000 Philadelphia draft when first shown to Porter: "I think undoubtedly the testimony of Mr. Porter is correct on this point."

XXXIII.—In charging the jury as follows as to drafts of dates prior to May 5, 1893, drawn by Bush and submitted to the consideration of the jury: "Providing such acts had been done for a period sufficiently long to establish a settled course of business it may be inferred from the general manner in which they have been done that such acts were known *or ought to have been known* by the directors, and that the cashier had authority"; the error particularly assigned, being the inclusion of the words "or ought to have been known."

XXXIV.—In charging the jury as follows: "The question turns upon an implied authority which is to be inferred from the proved acquiescence of the Elmira Bank in Bush's prior assumption of author ity," there being no proof that the directors knew of such assumption.

XXXV.—In charging the jury as follows as to the failure of his directors to object to Bush's having

signed said prior drafts: "This acquiescence is derived from their actual knowledge or from what should have been their knowledge of the conduct of the course of business of the officers. In this case no actual knowledge has been proved, but the point in the case is the inference to be derived from what the directors should have known by a proper examination of the course of business of their cashier."

XXXVI.—In charging the jury as follows as to Bush's general testimony that he made no difference between drafts to his own order, and those drawn to the order of any other purchaser or depositor: "This testimony is, of course, to be considered by you."

XXXVII.—In refusing to charge as requested by plaintiff as follows: "Plaintiff is entitled to a verdict for the amount of $7,012.50, with interest thereon from May 5, 1893, at the rate of 6 per cent. per annum."

XXXVIII.—In refusing to charge as requested by plaintiff as follows: "If the jury find that the transaction of May 5, 1893, as testified to by Mr. Porter, was not in the ordinary course of business, then they must find a verdict for the plaintiff in the full amount claimed, unless they are also of the opinion that the circumstances were not such as would lead a man of ordinary prudence in Porter's position to make inquiry about the ownership of the currency."

XXXIX.—In refusing to charge as requested by plaintiff as follows: "If the jury find that Porter willfully shut his eyes to the fact that this currency belonged to the Elmira National Bank, defendant must fail as to this defense, and plaintiff is entitled to a verdict for the full amount claimed."

XL.—In refusing to charge as requested by plaintiff as follows: "If the jury find that Porter's ignor-

ance of the true ownership of this currency was not merely negligent, but willful, defendant must fail as to this defense, and plaintiff is entitled to a verdict for the full amount claimed."

XLI.—In refusing to charge as requested by plaintiff as follows: "If the jury find that Porter's suspicions were aroused as to the true ownership of this currency, then, since he failed to make any inquiry, defendant must fail as to this defense, and plaintiff is entitled to a verdict for the full amount claimed."

XLII.—In refusing to charge as requested by plaintiff as follows: "The jury are not bound to believe Porter's testimony upon any point not conceded by the plaintiff, even where the testimony is uncontradicted."

XLIII.—In refusing to charge as requested by plaintiff as follows: "As bearing upon this defense the jury are entitled to take into consideration the large amount of the currency which Bush tendered in payment of his individual debt."

XLIV.—In refusing to charge as requested by plaintiff as follows: "The certification of the $15,012.50 check by Bush was a crime under the laws of the United States, and this was known, or ought to have been known, to both Bush and Porter."

XLV.—In refusing to charge as requested by plaintiff as follows: "If the jury find that when Bush brought in the $7,000 draft it was payable to 'J. J. Bush, Cashier,' then it was on its face the property of the Elmira National Bank, and if they find that under these circumstances the suspicions of an ordinarily prudent man would have been aroused as to whether the $8,000 was also the property of that bank, then, since Porter failed to make

an inquiry as to its ownership, the defendant must fail as to this defense, and the plaintiff is entitled to a verdict for the full amount claimed."

XLVI.—In refusing to charge as requested by plaintiff as follows: "The jury are not to take into consideration Bush's check of September 30, 1891, for $306.67."

XLVII.—In refusing to charge as requested by plaintiff as follows: "The jury are not to take into consideration Bush's check of December 31, 1891, for $306.67."

XLVIII.—In refusing to charge as requested by plaintiff as follows: "The jury are not to take into consideration the draft of March 1, 1893, on the Hide and Leather National Bank in favor of M. L. Greider for $600."

XLIX.—In refusing to charge as requested by plaintiff as follows: "The jury are not to take into consideration the draft of March 31, 1893, on the Chase National Bank to the order of the Mutual Life Insurance Company for $500."

L.—In refusing to charge as requested by plaintiff as follows: "The jury are not to take into consideration the draft of April 3, 1893, on the Chase National Bank to the order of Central Trust Company for $300."

LI.—In refusing to charge as requested by plaintiff as follows: "The burden is upon the defendant to establish by a preponderance of evidence that there was a well settled course of business in the Elmira National Bank authorizing Bush to draw drafts as cashier to his own individual order, without regard to amount, *and that this course of business was actually known to the directors of said bank;* if defendants have failed to prove this by a

preponderance of evidence, the jury must find a verdict for the plaintiff upon this issue."

LII.—In refusing to charge as requested by plaintiff as follows: "The jury are not to take into consideration any one of the prior drafts or checks which are in evidence, unless they find that defendant has established by a preponderance of evidence *that the directors of the bank knew* that a draft was then issued by Bush for his individual benefit, and signed by himself."

LIII.—In refusing to charge as requested by plaintiff as follows: "If the jury in the case of any one of these prior checks or drafts find that the amount is too small to constitute a precedent for the subsequent issuance of a $7,000 draft by Bush as cashier to his individual order for his individual benefit, then such check or draft must be left out of consideration.

Wherefore, plaintiff prays that the judgment entered herein be reversed, and a new trial of the above entitled cause granted.

Dated New York, January 31, 1901.

GOODRICH, WHITNEY & HAGEN,
Attorneys for Plaintiff.

(Endorsed)—United States Circuit Court, Southern District of New York.—Charles F. Gale, as Receiver of the Elmira National Bank, Plaintiff, against the Chase National Bank, Defendant.—Assignment of Errors.—Goodrich, Whitney & Hagen, Attorneys for Plaintiff, 59 Wall St., New York. - U. S. Circuit Court.—Filed Feb. 1, 1901.—John A. Shields, Clerk.

13882

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

CHARLES F. GALE, Receiver Elmira National Bank of Elmira, N. Y.,

AGAINST

CHASE NATIONAL BANK OF NEW YORK.

I direct that a writ of error from the United States Circuit Court of Appeals for the Second Circuit be sued out in this case.

CHARLES G. DAWES,
[SEAL.] Comptroller of the Currency.

OFFICE OF THE
COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., January 10, 1901.

(Endorsed)—Circuit Court of the United States, Southern District of New York.—Charles F. Gale, as Receiver of the Elmira National Bank, Plaintiff, against the Chase National Bank, Defendant.—Comptroller's Certificate.—U. S. Circuit Court.—Filed Feb. 1, 1901.—John A. Shields, Clerk.

United States Circuit Court of Appeals for the Second Circuit, October Term, 1900.

Submitted April 24, 1901; decided May 11, 1901.

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| CHARLES F. GALE, as Receiver of the Elmira National Bank, Plaintiff in Error, *vs.* THE CHASE NATIONAL BANK, Defendant in Error. | No. 158. Error to the Circuit Court of the United States for the Southern District of New York. Before Judges Wallace and Lacombe. |

*Per Curiam:* The questions presented on this appeal are interesting and some of them have not been passed upon at least in concrete form by the Supreme Court. The record, however, does not seem to present any important modifications (save only as to the number and particulars of former cashier's drafts not objected to) from that which was before this court on the first writ of error (43 C. C. A. 496).

We therefore deem it unnecessary to add anything to the exhaustive discussion of the questions which will be found in the former opinion. Upon that opinion and the careful review of the new proofs which will be found in the judge's charge, the judgment of the circuit court is affirmed.

E. B. Whitney, for the plaintiff in error.
Thomas B. Reed, for the defendant in error.

At a stated term of the United States circuit court of appeals, in and for the second circuit, held at the court-rooms in the Post-office building in the city of New York, on the 15th day of May one thousand nine hundred and one.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, circuit judges.

CHARLES F. GALE, as Receiver of the Elmira National Bank, Plaintiff in Error,
*vs.*
THE CHASE NATIONAL BANK, Defendant in Error.

Error to the circuit court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of record from the circuit court of the United States, for the southern district of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said circuit court be and it hereby is affirmed with costs.

It is further ordered that a mandate issue to the said circuit court in accordance with this decree.

E. H. L.

Endorsed: United States circuit court of appeals, second circuit. Charles F. Gale, as receiver *vs.* Chase National Bank. Order for mandate. United States circuit court of appeals, second circuit. Filed May 15, 1901. William Parkin, clerk.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *May* 17, 1901.

Messrs. Goodrich, Whitney & Hagen, 59 Wall street, New York city.

GENTLEMEN: I direct that a writ of error from the United States Supreme Court be sued out in the case of Charles F. Gale, as receiver of the Elmira national bank *v.* The Chase National Bank.

I direct also, that, in view of the importance of the questions involved in this case, the very long delays in the litigation, and the fact that this case is delaying the final settlement of the affairs of the Elmira national bank, which are otherwise in a position to be wound up, every effort be made to secure an advancement of the case upon the docket of the Supreme Court.

Respectfully,

F. P. KANE,
*Deputy & Acting Comptroller.*

Endorsed: United States circuit court of appeals, second circuit. Filed May 20, 1901. William Parkin, clerk.

Supreme Court of the United States, October Term, 1900.

CHARLES F. GALE, as Receiver of the Elmira National Bank, Plaintiff,
*against*
THE CHASE NATIONAL BANK, Defendant.
} Assignment of Errors.

And now comes Charles F. Gale, as receiver as aforesaid, plaintiff in error, by his counsel and respectfully represents that he feels himself to be aggrieved by the proceedings and judgment in the above-entitled cause in the United States circuit court of appeals for the second circuit, and says that in the record and proceedings therein there is manifest error in overruling each and every one of his assignments of error forming a part of the record in said action before the said circuit court of appeals, to which assignments he begs leave to refer without repetition thereof.

Wherefore, the said Charles F. Gale as receiver as aforesaid respectfully prays that the errors assigned be examined and corrected by this honorable court and that the judgments entered herein by the circuit court and circuit court of appeals be reversed, and a new trial of the above-entitled cause granted.

Dated New York, May 16, 1901.

CHARLES F. GALE,
*As Receiver of the Elmira National Bank,*
By EDWARD B. WHITNEY,
*His Attorney.*

Endorsed: Supreme Court of the United States, October term, 1900. Charles F. Gale as receiver of the Elmira national bank plaintiff against The Chase National Bank, defendant. Assignment of errors. Edward B. Whitney, attorney for plaintiff, 59 Wall street, N. Y. city. Due and timely service of a copy of the within assignment of errors is hereby admitted. Dated New York May 18, 1901. Reed, Simpson, Thacher & Barnum, attorneys for defendant in error. United States circuit court of appeals, second circuit. Filed May 20, 1901, William Parkin clerk.

UNITED STATES OF AMERICA, *Southern District of New York*, } ss:

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 140, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Charles F. Gale, as receiver of Elmira national bank, against Chase National Bank, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 20th day of May, in the year of our Lord one thousand nine hundred and one, and of the Independence of the said United States the one hundred and twenty-fifth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk*.

{ Ten cent United States internal-revenue stamp, canceled 5, 20, '01. W. P., c'k. }

UNITED STATES OF AMERICA, ss:

To the Chase National Bank, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the second circuit, wherein Charles F. Gale, as receiver of the Elmira national bank, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this 17th day of May, in the year of our Lord one thousand nine hundred and one.

R. W. PECKHAM,
*Associate Justice of the Supreme Court of the United States.*

[Endorsed:] United States circuit court of appeals, second circuit. Filed May 20 1901. William Parkin, clerk.

Due and timely service of a copy of the within citation is hereby admitted.

New York, May 18, 1901.

REED, SIMPSON, THACHER & BARNUM,
*Attorneys for Defendant in Error.*

UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals before you, or some of you, between Charles F. Gale, as receiver of the Elmira national bank, plaintiff in error, and The Chase National Bank, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of May, in the year of our Lord one thousand nine hundred and one.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
*Clerk Supreme Court U. S.*

Allowed by
R. W. PECKHAM,
*Associate Justice of the Supreme Court of the United States.*

[Endorsed:] United States circuit court of appeals, second circuit. Filed May 20 1900. William Parkin, clerk.

Due and timely service of a copy of the within writ of error is hereby admitted.

New York, May 18, 1901.

REED, SIMPSON, THACHER & BARNUM,
*Attorneys for Defendant in Error.*

Endorsed on cover: File No. 18,177. U. S. C. C. of appeals 2nd circuit. Term No. 331. Charles F. Gale, as receiver of the Elmira national bank, plaintiff in error, *vs.* The Chase National Bank. Filed May 21st, 1901.

No. 105.

Brf. of Whitney for Pl'ff in Err.

Supreme Court U.S.
FILED
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IN THE

# Supreme Court of the United States.

Filed Nov. 29, 1902.

OCTOBER TERM, 1902.

CHARLES F. GALE, as Receiver of the Elmira National Bank,
*Plaintiff in Error,*
*against*
THE CHASE NATIONAL BANK,
*Defendant in Error.*

No. 105.

## BRIEF FOR PLAINTIFF IN ERROR.

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| CHARLES F. GALE, as Receiver of the Elmira National Bank, Plaintiff in Error, *against* THE CHASE NATIONAL BANK. | No. 105. |

IN ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF FOR PLAINTIFF IN ERROR.

This was an action to recover $15,012.50 with interest from May 5, 1893, being the amount of a certain check claimed to have been unlawfully charged by the defendant against the Elmira National Bank on said day; the deposit account of the Elmira Bank with the defendant having been soon thereafter settled, with the exception of this disputed item.

The action was first tried before Judge TOWNSEND and a jury, and a verdict rendered for the defendant. Upon writ of error the judgment entered upon this verdict was reversed by the Circuit Court of Appeals and a new trial ordered (104 Fed. Rep, 214, SHIPMAN, J.).

The action was tried for the second time before Judge SHIPMAN and a jury. A verdict was directed for the plaintiff for the sum of $12.50, with interest from said date. As to the balance of the claim the jury found for the defendant.

Upon a second writ of error by the plaintiff the judgment was affirmed (Record, p. 137, WALLACE and LACOMBE, JJ.).

## Statement of the Case.

The Elmira National Bank suspended business on May 23, 1893. Charles Davis, its first Receiver, took possession on June 2 of that year. Charles F. Gale, the present Receiver, was his clerk and succeeded him after his death. J. J. Bush was at the time of its failure, and had been for over three years theretofore, the cashier of the bank. On May 5 of that year defendant, a national bank in New York City, held Bush's individual promissory note for $15,000, upon which there was due $12.50 interest. It held also certain shares of the stock of the Elmira Bank as collateral to said note. The Elmira Bank kept an account with defendant.

These facts are undisputed; and for the purposes of this statement of facts I shall assume the testimony of defendant's witnesses to be both competent and true.

On the afternoon of May 4, 1893, William H. Porter, Vice-President of the defendant the Chase National Bank, rang up Mr. Bush on the long-distance telephone, referred to the financial conditions then prevailing (commonly known as the panic of 1893), and asked him to substitute other collateral for his note or send

additional collateral. Bush replied that he would pay off the loan the next morning (pp. 22, 27). The next morning, when Porter came down to the bank, he found Bush sitting there. Porter says (pp. 22–23):

> He had a little satchel there with him on the table. He greeted me and referred to the telephone conversation of the previous day, and stated that he had come down to pay off the loan. He opened the satchel and took out of it a package of currency, $8,000, and a cashier's check or draft of the Elmira National Bank, signed by him as cashier on the Quaker City National Bank. It was for the purpose of paying off his note.

This Quaker City Bank was in Philadelphia. The draft was for the sum of $7,000, and, while signed by him as cashier of his bank, was made payable to himself individually (p. 26).

It was not claimed in the answer or on the trial that either the currency or the draft belonged to Bush or to any other owner than the Elmira Bank. The currency was taken by Bush out of the till and "was the bank's money" (pp. 79–81). The Court charged the jury that both the currency and the draft were embezzled (p. 105).

Porter declined to accept the tender, because the reputation of Philadelphia banks was such at that period that he was unwilling to treat a draft on Philadelphia as cash. His explanation of the situation is as follows (pp. 23, 28):

> As a bank officer, Mr. Bush appreciated, as I did, the situation in Philadelphia, which was more acute on account of the panic than anywhere else in the United States, not excepting New York, and it was impossible to get money or returns for checks on Philadelphia. * * * My reasons for

refusing the Philadelphia draft were not that the credit of the Philadelphia bank was not good. That was not the point. Our Philadelphia correspondents were several weeks in arrears at that time, and had not paid us the money on checks we had sent there to collect for several weeks. They had put them to our credit, but had not remitted for them, because it was impossible to buy New York funds in Philadelphia. You could not go into a Philadelphia bank and buy a draft on New York for any money. They were four weeks delinquent in remitting. I did not have the Quaker City Bank particularly in mind. I had no objection to the bank at all. I objected to any check on any Philadelphia bank. It would have been the same on any other bank.

Bush then said that he was anxious to use this $7,000 draft, and asked how it could be done. Porter replied in effect with a suggestion that, while he himself would not permit his own bank to give credit to Philadelphia, Bush might, if he pleased, assume that risk for the Elmira Bank; and Bush accepted the suggestion. Porter states it as follows (pp. 23, 28):

I told him that I did not know of any way unless, if he kept a personal account with the Elmira National Bank, which he said he did, he drew his personal check on the Elmira Bank for the amount of this loan, $15,000, and the interest which was due for four or five days, and accept that check as cashier of the bank, making it payable at the Chase National Bank at New York, which was New York funds, and would be available to pay a note payable in New York City, and to let that $15,000 be deposited to the credit of his bank, the Elmira Bank, the $8,000 of currency and the $7,000 check. He said that was acceptable to him.

> * * * I was unwilling on May 5, 1893, to take a Philadelphia bank draft and credit it on my books, and allow him to draw against it if it was a large draft. In this case he was going to pay off a loan and the interest on it. I suggested this arrangement as the only way I knew whereby he could use this Philadelphia check.

Although connected by telephone with the Elmira Bank, Porter made no inquiry there as to Bush's authority in the transaction, nor did he make any inquiry of Bush himself as to his ownership of the currency or right to use the $7,000 draft. Porter says (p. 29):

> I never communicated at any time with any of the other directors or officers of the Elmira Bank about Mr. Bush's authority in this transaction, either at the time or afterwards. I made no inquiry of Mr. Bush as to whether he owned the currency or whether it belonged to the Elmira Bank. I made no inquiry of him as to his authority to use this draft for his personal benefit.

Bush then endorsed the $7,000 draft "For deposit in Chase National Bank to credit of J. J. Bush, cashier." "Having done that, he noticed that it was drawn to his personal order and endorsed as cashier, and, instead of endorsing it personally above this cashier endorsement, he wrote the word 'cashier' on the face of the draft to make it correspond with the endorsement which he had already made" (p. 26).

Porter wrote out a check of the Elmira Bank for $15,012.50, payable to the order of the Chase Bank, and wrote across the back the words "Certified and accepted, May 5, 1893, payable at Chase National Bank, New York. Elmira National Bank by.....

Bush then signed on the face "J. J. Bush" and on the back "J. J. Bush, Cashier" (Complaint, p. 7, not controverted; Testimony, p. 23).

Porter then called in the discount clerk and gave him the $8,000 currency, the $7,000 draft and the $15,012.50 check, instructing him to have the latter charged up to the Elmira Bank's account, and the other items credited to that account; the $7,000 draft to be credited for collection only, which "in banking parlance means that an item is not credited until you get the money for it" (pp. 23-4, 28). The discount clerk handed the money to the teller to be credited to the account of the Elmira Bank; handed the $7,000 draft to the collection clerk "to be entered for collection for account of" that bank; and handed the $15,012.50 check to the loan clerk, telling him that it "was to be used in paying the loan of $15,000, the balance due from Mr. Bush" (p. 33).

It is the custom of the defendant the Chase National Bank when a deposit is made to have "either a deposit slip or a letter of some sort handed in." The bank has a form which it fills out. These letters and deposit slips are preserved and kept among the papers of the bank. If no deposit slip is made out the currency, according to the usual custom, would appear as a credit in a certain book called the "duplex." In this case, however, no deposit slip or letter can be found, and the deposit of the $8,000 currency does not appear on the duplex (pp. 81-3). The $7,000 draft was entered, *not as cash*, but in a book indorsed "Time Collections" in the account which contained the original entries of the drafts deposited by the Elmira National Bank for collection. The entry is in the usual form of a collection, *and does not indicate that*

*the sum, when collected, was to be devoted to any particular purpose.* It does not appear that the $7,000 draft was entered on the duplex. The entry of the $15,012.50 check was made on the duplex as a charge to the Elmira Bank and was balanced by the credit to Bush of his loan and interest (p. 82). When subsequently collected on May 8, the $7,000 draft was credited to the Elmira Bank in its general account (p. 20).

The defendant the Chase Bank continued, and has ever since remained, in possession of Bush's note and collateral (pp. 26, 34).

The $7,000 draft in the form as deposited—that is, so altered as to be payable to "J. J. Bush, Cashier," instead of J. J. Bush, individually—was presented by the defendant to the Quaker City Bank for collection.. It was paid by that bank, as shown on its back.

On the books of the Elmira National Bank it had been credited to the Quaker City Bank and charged to the defendant—that is, the same entries were made as if it represented a mere transfer of funds from Philadelphia to New York. The charge of this draft to defendant was in the form "J. J. B. $7,000." The initials are those of Bush's name, but there is no entry of the amount on his account, as would be the case if the entry related to his individual business. The initials were put there for some purpose of identification, which is now impossible to ascertain by competent testimony (pp. 98–102). A possible explanation is afforded by the fact that the check was originally signed in blank and the amount filled in afterward, apparently at defendant's bank (p. 97); so that quite possibly the initials were intended to indicate the source of information as to the item entered. Mr. Porter admits that the draft as presented to the

Quaker City Bank bore no indication that it represented moneys drawn by Bush for his individual benefit. He says (p. 30):

> According to the customs of banking a check payable to the order of J. J. Bush, Cashier [Mr. Bush being Cashier of the Elmira National Bank], is exactly equivalent, I should think, to a check payable to the order of the Elmira National Bank. If the check was credited, it would make it that way to correspond with the endorsement. As a check so deposited in my bank I suppose it was substantially a check to the order of the Elmira National Bank and endorsed by the Elmira National Bank. I do not know of anything on that check to apprise the Quaker City National Bank that the check or draft was drawn for the individual benefit of J. J. Bush. If the word "Cashier" had not been added on the face of it, I do not know whether the Quaker City National Bank would or would not have known that it was drawn for the individual interest of J. J. Bush.

The facts were developed by examination of the monthly account and vouchers rendered by defendant to the Receiver on June 6. Thereafter the $15,012.50 was demanded and refused (pp. 20–1).

*Bush's Prior Transactions.*

The remainder of the testimony in the record relates to Bush's actions as cashier of the Elmira Bank prior to May 5, 1893, and in particular to the number of times he signed or may have signed bank drafts to his own individual order for his individual benefit. This evidence was introduced in the endeavor to show either actual or ostensible au-

thority to issue the Quaker City $7,000 draft, which upon its face was presumptively unauthorized and illegal. In other words, defendant undertook to show a prior "course of business" by Bush as cashier of the Elmira Bank, from which the jury might infer either that the directors of that bank had actually authorized, or knowingly permitted him to issue bank drafts to any amount in his own favor, or that the directors had been negligent in failing to discover his actions and put a stop to them.

This evidence was all introduced over our objection and exceptions, the grounds of which appear in our first specification of error.

Bush became cashier in January, 1890 (p. 35). The president, Jackson Richardson, also had the power to sign drafts (p. 62), and from early in 1891 until April, 1892, one C. C. Swan, a director and assistant cashier of the bank, also signed such drafts (pp. 87–9, 63). On July 1, 1892, one E. A. P. Smith was appointed teller and authorized to sign drafts in the absence of the president, vice-president and cashier. Mr. Smith was afterwards given the title of assistant cashier (pp. 63–4). Mr. Richardson and Mr. Smith are both dead (pp. 34, 95).

Mr. Gale, the Receiver of the Elmira Bank and plaintiff in this action, afforded to defendant's counsel the fullest facilities for examining the papers of the failed bank in search of any returned drafts that might have been drawn by Bush, as cashier, to his own individual order. Defendant's counsel did actually examine about one-half of these returned drafts, and Mr. Gale with the assistance of a clerk made two searches through all of them. It appeared that a considerable number of vouchers were missing. The

vouchers had been tied up in loose bundles prior to the time when the first Receiver of the bank took possession, and had probably not been looked at until shortly before this trial. Defendant's counsel, when Bush's deposition was about to be taken, wrote him asking him to produce before the examiner any checks which he might have drawn for drafts issued to his own order as cashier. This brought out the fact that Bush had some years before made a collection of papers for use at the trial of another case, which papers included the checks drawn for drafts issued to his own order (pp. 64, 76, 86–7, 89, 90, 93–4). All of these checks, together with all of the drafts to his own order which had been found by the searches above mentioned, were produced at the taking of his deposition, and a large number of them were admitted in evidence at the trial of the action. A number of the drafts and checks which had been admitted were subsequently excluded from the consideration of the jury, either because they appeared to have been used in the business of the bank and not Mr. Bush's individual business, or because they were not drawn to the order of Bush, and therefore could have given no indication to the auditing committee of the bank that they were for his benefit.

There were about 25,000 to 26,000 drafts in all (p. 94).

After this sifting process eight drafts remained, which had been signed by Bush as cashier and made payable to his own individual order, and which were stated by him to have been for his own benefit. They were all drawn on the Chase National Bank. They are as follows:

DRAFTS SUBMITTED TO JURY.

| | | | | | | |
|---|---|---|---|---|---|---|
| P. 43 | Exh. | 4 | April | 2, | 1891 | $170.83 |
| 44 | | 5 | Aug. | 8, | 1891 | 129.17 |
| 44 | | 6 | March | 8, | 1892 | 96.67 |
| 45 | | 7 | Feb. | 17, | 1891 | 35.07 |
| 46 | | 8 | Jan. | 15, | 1892 | 50. |
| 48 | | 10 | Feb. | 18, | 1892 | 30. |
| 49 | | 11 | May | 6, | 1892 | 5. |
| 56 | | 33 | Feb. | 15, | 1893 | 77.50 |
| | | | | | | $594.24 |

There was also a draft to Bush's order for $30 on Feb. 11, 1893 (p. 94), which is missing. It does not appear who signed the draft, or for what purpose it was issued, and it was not referred to in the Judge's charge.

In addition to these eight drafts, there were the following checks drawn by Bush to the order of "Dft. to J. J. Bush" or "Dft. to order J. J. Bush," upon which checks it was admitted that drafts had been issued, drawn on the Chase National Bank, which drafts have been subsequently lost. It did not appear whether or not these drafts were signed by Bush as cashier, and as to three of them it affirmatively appeared that some drafts drawn on the same day were signed by Swan, the assistant cashier (pp. 88–9). The checks are as follows:

CHECKS SUBMITTED TO JURY.

| | | | | |
|---|---|---|---|---|
| P. 73 | Exh. 54 | Aug. 31, 1891 | | $100. |
| 73 | 55 | Sept. 30, 1891 | | 306.67 |
| 73 | 56 | Dec. 31, 1891 | | 306.67 |
| 74 | 60 | June 6, 1892 | | 769.03 |
| | | | | $1,482.37 |
| | | | Drafts, | 594.24 |
| | | | | $2,076.61 |

Bush stated that in general he drew drafts in his own favor whenever he needed them (pp. 41–2), but did not state that he needed or drew any other drafts to his own order than the ones which were actually in evidence; and the search through the original papers had been so complete that the trial Judge was of the opinion "that all the papers pertaining to Bush's drafts to his own order * * * have been searched out * * * and that you have about the whole story" (p. 115).

As to all of the drafts drawn to his own order Bush testified that he made no attempt to conceal the fact that he was drawing them; that they came regularly back to the bank and were kept among its vouchers, and when not lost were handed over to the Receiver; that they were open to the inspection of any director or officer who desired to examine them (pp. 40–1, 78). He was then asked whether any objection was ever made by anyone to the issuing or using of any of these drafts. This was objected to on the ground that it was not proved that any of these drafts came to the knowledge of the directors of the bank. The objection being overruled, he answered: "Not that I ever heard of" (p. 42).

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At a later period of the trial it appeared affirmatively that the auditing system of the bank was not of such a character as to disclose to the directors the fact that drafts issued to the order of Bush were signed by himself as cashier. The auditing committee of the directors was known as the "Examining Committee," and among its duties were "to exercise a supervision of the business of the bank, and to examine every three months the affairs of this bank, count its cash, compare its assets and liabilities with the amounts in the general ledger," and report to the board of directors at the next regular meeting. The acting members of the Examining Committee for the years 1891 and 1892 appear by the minutes to have been J. B. Coykendall and Frederick H. Richardson. The third member does not appear to have acted for those years. Messrs. Coykendall and Richardson were re-elected as two of the members of the committee for 1893, but the bank failed before the time for them to report for that year (pp. 62–4, 85). The deposition of Mr. Coykendall was taken in this case and read to the jury. He confirmed the statement that Mr. Richardson and himself were the active members, and testified that they were always present at the auditing, which was done every two or three months. Mr. Coykendall's. description of the auditing is as follows (p. 84) :

> We first took the notes and tabulated them and added them up, and then added to that amount the various notes that had been sent off for collection, for rediscount, to see if they balanced with the discount ledger—I mean the notes of the various persons that had been discounted at the bank. We then counted the cash to see that it agreed with the balance. That was the main part

of it. There were no other steps that I remember.

Q. Did you ever examine any of the returned drafts from the Chase National Bank, or other corresponding banks?

A. No, sir.

Q. Did you ever examine any of the checks of the depositors in the bank?

A. No, sir.

Q. Did you ever have your attention called in any way to the question which officer of the bank signed these drafts on other banks?

A. No, sir.

Q. Did you ever have any conversation with Mr. Bush as to whether or not he was signing drafts to his own order?

A. I knew nothing about that at all. No, sir.

Q. So far as you were aware, was there ever any conversation by any of the directors of the bank in reference to this matter?

A. Not that I was aware of; no, sir.

Mr. Bush's deposition on the same subject was read in part by defendant on the trial as follows (p. 77):

> The examining committee was the committee which did the auditing of the books and papers of the bank, independent of the loan committee. I sometimes have seen that examining committee at work. They started by counting the checks and the cash items, and then I have seen them look at the depositor's ledger and the various books of the bank.

Defendant's counsel dropped the subject at this point. It was subsequently taken up by the plaintiff and continued as follows (p. 79):

Q. What else?

A. I should say that that was about the extent

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of their examination. I think the loan committee took charge of checking up the loans, so I don't think there was any other work for the examining committee. I never saw the examining committee examine the bundles of returned drafts from the Chase National Bank, or any of them, or bundles of returned drafts from any other bank, or the bundle of checks from any depositor. I never saw any director examine any of the checks of the depositors, or any of the drafts of our bank on other banks. There was no conversation between me and the directors of the bank at any time as to who signed any particular draft given by the Elmira National Bank on any other bank. I never saw any director of the Elmira National Bank look to see who signed any such draft.

There was no stub book of drafts on the Chase National Bank. Instead there was kept a "draft record." This book did not preserve the names of the payees of the drafts drawn until October, 1892. Subsequent to that time it showed only two drafts to Bush's order, of the amounts of $30 and $77.50 respectively. There were 5,987 drafts issued and shown by the book during this short period (p. 94). To learn of the other drafts above set forth it would have been necessary for the directors to go through the bundles of Bush's checks before their return to him, or through the bundles of returned vouchers from New York.

Defendant's counsel attempted to show that Bush ran the Elmira Bank without supervision, but was unsuccessful (pp. 51–2). He was permitted to show, against plaintiff's objection, that the Elmira Bank management was loose in the matter of permitting overdrafts, both to Bush and to other customers.

## Specification of Errors.

The questions which I desire to bring to the attention of this Court will sufficiently appear from the following rulings (the numbering being that of the assignments of error):

VII (pp. 37–9). In permitting the defendant to read from the deposition of the witness J. J. Bush, over objection by plaintiff on the grounds hereinafter stated, the following question: "Mr Bush, you drew other drafts as cashier of the Elmira National Bank to your own order besides the $7,000 Quaker City draft which has been mentioned, did you not?" To which the witness answered, "Yes, sir." The above question is objected to on the following grounds: (1) As immaterial and incompetent as against the Elmira National Bank; (2) that it cannot be any evidence of a course of business, because it does not appear that any of them came to the attention of any of the directors of the bank; (3) that it is no evidence of any course of business, because the directors of that bank could not lawfully have given Bush any general power to issue drafts in his own favor for his individual debts; (4) because no evidence as to prior drafts as to Bush's individual order would justify the draft in question, which is admitted to have been payable to Bush as cashier, that is, to the Elmira National Bank, when received by the defendant; (5) that the defendant was put on notice and inquiry as to the true ownership of the $7,000 draft by this endorsement by Bush as cashier, and as it made no inquiry it is not in a positon to appeal to any course of business as to drafts to Bush's individual order, were it conceded that such a course of business existed; (6) that the defendant, by presenting this

$7,000 draft for payment to the Philadelphia bank represented to that bank and to the Elmira National Bank that it represented a mere transfer of funds of the Elmira Bank from Philadelphia to New York, and is estopped to assert the contrary; (7) on the ground that the whole transaction testified to by Porter was irregular and outside of any coure of business, and that, therefore, cannot be sustained by any proof as to a course of business; (8) that the only evidence by which the defendant could to any extent be relieved from liability to repay the whole amount would be evidence that the $15,000, or some part thereof, was not the property of the Elmira National Bank, and that is neither pleaded nor proved.

XII (p. 43). In receiving in evidence, over objection by plaintiff that it is immaterial, that it never came to the knowledge of the directors of the bank, and that it is for too trivial an amount to form any precedent for a draft of $7,000, the draft of the Elmira National Bank on the Chase National Bank, signed by J. J. Bush, cashier, to the order of J. J. Bush, for $170.83, marked Exhibit 4.

XIII (pp. 43–8). In receiving in evidence, over objection by plaintiff that they are immaterial, that they never came to the knowledge of the directors of the bank, that they are for too trivial amounts to form any precedent for a draft of $7,000, the following drafts of the Elmira National Bank on the Chase National Bank, each signed by J. J. Bush, cashier, to the order of J. J. Bush, each being separately objected to and separately assigned for error:

| | | | | | | |
|---|---|---|---|---|---|---|
| *(a.)* | The draft for | | $129.17, | marked | Exhibit | 5. |
| *(b.)* | " | " | $96.67, | " | " | 6. |
| *(c.)* | " | " | $35.07, | " | " | 7. |
| *(d.)* | " | " | $50, | " | " | 8. |
| *(e.)* | " | " | $100, | " | " | 9. |
| *(f.)* | " | " | $30, | " | " | 10. |

XIV (pp. 45–49). In receiving in evidence, over objection by plaintiff that it is immaterial, that it never came to the knowledge of the directors of the bank, and that it is for too trivial an amount to form any precedent for a draft of $7,000, the draft of the Elmira National Bank on the Chase National Bank, signed by J. J. Bush, cashier, to the order of J. J. Bush, for $5, marked Exhibit 11.

XXVII (p. 103). In denying plaintiff's motion at the close of the testimony herein for the direction of a verdict for the plaintiff for the full amount claimed.

XXXI (pp. 107, 116). In charging the jury as follows: " But the plaintiff in attempting to establish bad faith takes the burden of proof."

XXXIII (pp. 110, 116). In charging the jury as follows as to drafts of dates prior to May 5, 1893, drawn by Bush and submitted to the consideration of the jury: " Providing such acts had been done for a period sufficiently long to establish a settled course of business it may be inferred from the general manner in which they have been done that such acts were known *or ought to have been known* by the directors, and that the cashier had authority;" the error particularly assigned, being the inclusion of the words " or ought to have been known."

XXXIV (pp. 110, 116). In charging the jury as follows: " The question turns upon an implied authority which *is to be inferred* from the *proved* acquiescence

of the Elmira Bank in Bush's prior assumption of authority," there being no proof that the directors knew of such assumption.

XXXV (pp. 111, 116). In charging the jury as follows as to the failure of his directors to object to Bush's having signed said prior drafts: "This acquiescence is derived from their actual knowledge *or from what should have been their knowledge* of the conduct of the course of business of the officers. In this case no actual knowledge has been proved, but the point in the case is the inference to be derived from what the directors *should have known* by a proper examination of the course of business of their cashier."

XXXVII (p. 116). In refusing to charge as requested by plaintiff as follows: "Plaintiff is entitled to a verdict for the amount of $7,012.50, with interest thereon from May 5, 1893, at the rate of 6 per cent. per annum."

XXXVIII (p. 117). In refusing to charge as requested by plaintiff as follows: "If the jury find that the transaction of May 5, 1893, as testified to by Mr. Porter, was not in the ordinary course of business, then they must find a verdict for the plaintiff in the full amount claimed, unless they are also of the opinion that the circumstances were not such as would lead a man of ordinary prudence in Porter's position to make inquiry about the ownership of the currency."

XLI (p. 117). In refusing to charge as requested by plaintiff as follows: "If the jury find that Porter's suspicions were aroused as to the true ownership of this currency, then, since he failed to make any inquiry, defendant must fail as to this defense, and plaintiff is entitled to a verdict for the full amount claimed."

XLIV (p. 118). In refusing to charge as requested by plaintiff as follows: "The certification of the $15,012.50 check by Bush was a crime under the laws of the United States, and this was known, or ought to have been known, to both Bush and Porter."

XLVIII (p. 119, see pp. 57–8, 111–2). In refusing to charge as requested by plaintiff as follows: "The jury are not to take into consideration the draft of March 1, 1893, on the Hide and Leather National Bank in favor of M. L. Greider for $600."

LI (p. 119). In refusing to charge as requested by plaintiff, as follows: "The burden is upon the defendant to establish, by a preponderance of evidence that there was a well settled course of business in the Elmira National Bank, authorizing Bush to draw drafts as cashier to his own individual order, without regard to amount, *and that this course of business was actually known to the directors of said bank;* if defendants have failed to prove this by a preponderance of evidence, the jury must find a verdict for the plaintiff upon this issue."

LII (p. 119). In refusing to charge as requested by plaintiff as follows: "The jury are not to take into consideration any one of the prior drafts or checks which are in evidence, unless they find that defendant has established by a preponderance of evidence *that the directors of the bank knew* that a draft was then issued by Bush for his individual benefit, and signed by himself."

LIII (p. 120). In refusing to charge as requested by plaintiff as follows: "If the jury in the case of any one of these prior checks or drafts find that the amount is too small to constitute a precedent for the subsequent issuance of a $7,000 draft by Bush as cashier to

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his individual order for his individual benefit, then such check or draft must be left out of consideration."

## The Pleadings and Issues.

Defendant having paid the balance of the account as rendered by it on June 6, plaintiff sued for the amount withheld on account of the improper item of $15,012.50; and proved the impropriety of this item by identifying it with the check of that amount set forth in the complaint, which check by the uncontroverted allegations of the complaint, was illegally certified because it was (1) drawn to the order, and used to pay the personal debt, of the certifying officer, (2) certified away from the bank on which it was drawn (and as subsequently appeared, without prior entry on that bank's books), and (3) payable away from the bank on which it was drawn.

Having proved demand and refusal, and tendered the check, plaintiff rested.

Defendant never seriously supported the $15,012.50 check, or seriously urged that plaintiff was not entitled to the $12.50 judgment which the Court directed, but relied upon a defense which at the trial appeared to be a defense in mitigation of damages, although the answer, verified by Mr. Porter, was so drawn as to conceal this, thus somewhat befogging the issues. The defense as pleaded and offered at the trial was not that the $15,000 belonged to anybody but the Elmira Bank, but that they "apparently" belonged to Bush.

## ARGUMENT.

### I.

*Bush's certification of the $15,012.50 check was illegal, and plaintiff was entitled to judgment for that amount upon the facts admitted in the pleadings, unless some affirmative defense could be established.*

This point requires but very brief treatment, as it rests upon principles never doubted, which have received the assent of the Courts below.

The check was of course an obligation of Bush alone until duly certified by the Elmira Bank; nor could it be charged to that bank without presentation at Elmira, unless the certification was in such form as to make it duly payable elsewhere. It was therefore only necessary for the plaintiff to show that the certification was presumptively illegal. This he showed by the admissions in the answer and upon these grounds:

FIRST. The principal's name was signed by the agent for his own personal benefit. These facts were known to the defendant, which does not claim that the directors of his bank were consulted either then or afterwards, or that there was any prior course of business giving color to such a transaction. Lack of authority is presumed.[1] It was unnecessary to prove the state of his account at the moment.[2] Of course, defendant was at

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[1] 1 Morse on Banks and Banking (3d ed.) p. 323; Claflin vs. Farmers' and Citizens' Bank, 25 N. Y., 293, 294-5, reversing s. c., 36 Barb., 540; Gale vs. Chase Natl. Bank, 104 Fed. Rep., 214; and cases cited under Point II., *infra;* Huffcut on Agency, § 115.

[2] 1 Morse, *ut sup.;* Corn Exchange Bank vs. American Dock Co., 149 N. Y., 174, 180-1; Lamson vs. Beard, 94 Fed. Rep., 30, 39; Claflin case, *supra*, at p. 295.

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liberty to prove, if possible, that plaintiff has or could have been made whole ; but that does not depend upon the state of the cashier's account at the moment, when plaintiff was unaware of the certification.

SECOND. It was signed two hundred miles away from his bank, in another city[1] ; and in defendant's proof it subsequently appeared that, as the party asking for and obtaining the certification well knew at the time, it was signed without being first " regularly entered to the credit of the dealer upon the books of the banking association[2]." Had it been so entered, being for so large an amount, it would quite likely have reached the ear of the directors.

THIRD. It was made payable elsewhere than at the bank upon which it was drawn. A cashier has no such authority by virtue of his office, and it is in violation of the provision of Section 5190 of the Revised Statutes that the usual business of a bank should be transacted at its office[3]. Such an act is not in the regular course of business, even when done for the bank's supposed benefit and on notice to its directors. Had it not been made payable at defendant's office, defendant would doubtless have promptly presented it at Elmira.

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[1] 1 Morse on Banks and Banking (3d Ed.), pp. 352-4; Bullard vs. Randall, 1 Gray, 605, SHAW, C. J. The remarks to the contrary in Merchant's Bank vs. State Bank, 10 Wall., 604, 650-1, were not necessary to the decision (p. 644), and were the subject of vigorous dissent (p. 676).

[2] Act of July 12, 1882, Ch. 290, § 13 (1 R. S. Supp., 357). This section, while making its violation a crime, does not validate the check, as does Rev. St., §5208 under other circumstances, nor is it necessary that the offense be " wilful." Spurr vs. United States, 174 U. S., 728, 734.

[3] Armstrong vs. Second Nat'l Bank, 38 Fed. Rep., 883, 886.

## II.

*Laying out of consideration the evidence as to the alleged course of business permitting Bush to draw checks to his own order, for his own personal benefit, the transaction between Bush and Porter was illegal, and is no defense to this action.*

There are various arguments that appear to me to be conclusive in support of this proposition. I shall reserve all but one of them for the next point, to which they are equally applicable, and confine myself at present to a discussion of the premise upon which defendant's whole position rests—that Porter was justified in assuming the $7,000 draft produced by Bush to have been the latter's individual asset, which he could rightfully apply to his individual debts.

Porter testifies that this $7,000 draft, when first tendered him by Bush, was to Bush's individual order, and that the word "cashier," which made it appear to be the property of his bank, was added thereafter. This was disputed by us upon the trial, but the Court substantially charged the jury to believe his story, and we shall assume it to be true[1].

The draft, it will be borne in mind, was signed by Bush himself, as cashier of his bank.

Defendants upon the first appeal to the Circuit Court of Appeals contended that upon its face, and irrespective of any prior course of business, the draft was presumptively a document duly issued and not calling for inquiry. This contention, although overruled, we suppose will be renewed at this Court.

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[1] Record, pp. 29-30, 97-8, 108.

There can be no dispute that a bank cashier is an agent of the bank; nor that an agent's general authority does not presumptively include the right to sign his principal's name for his own benefit; nor that, as a corollary to this, a party to whom the agent offers a paper so signed, in payment of his own debt, is put upon inquiry. With the exception of certain remarks in a New York case which we shall discuss, the Federal and State Courts are a unit upon all of these points. They are applied to this case of a cashier's draft to his own individual creditor;[1] to a cashier's indorsement, as cashier, of his own individual note;[2] to a bank officer's certification of his own check;[3] to a bank president's official letter directing his individual note to be charged against the bank;[4] to stocks or bonds issued by corporate officers for their own benefit;[5] to negotiable paper issued by agents other than bank officers;[6] and to *quasi* negotiable paper so issued.[7] It is the same rule which puts on inquiry

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[1] Anderson vs. Kissam, 35 Fed. Rep., 699; Lamson vs. Beard, 94 Fed. Rep., 30; Gale vs. Chase Natl. Bank, 104 Fed. Rep., 214; Campbell vs. Manufacturers' Bank (N. J.), 51 Atl. Rep., 497 (printed in the supplement to this brief).

[2] West St. Louis Bank vs. Shawnee County Bank, 95 U. S., 557, 559.

[3] Cas. cit. under I, *supra*.

[4] Chrystie vs. Foster, 61 Fed. Rep., 551; State Bank vs. Newton Bank, 66 Fed. Rep., 691.

[5] Moores vs. Citizens' Bank, 111 U. S., 156; Germania Safety Vault Co. vs. Boynton, 71 Fed. Rep., 797; Farrington vs. South Boston R. R., 150 Mass., 406.

[6] Gerard vs. McCormick, 180 N. Y., 261; Rochester Turnpike Co. vs. Paviour, 164 N. Y., 281; Park Hotel Co. vs. Fourth National Bank, 86 Fed. Rep., 742 and cas. cit. by SANBORN, J.; Atlantic Mills vs. Indian Orchard Mills, 147 Mass., 268, 276; Third Nat'l Bank vs. Maine Lumber Co., 44 Minn., 65, 67; Porter vs. Winona Co., 78 Minn., 210, 213; Camden Co. vs. Abbott, 44 N. J. Law, 257.

[7] Bank of New York vs. American Dock Co., 143 N. Y., 559; Corn Exchange Bank vs. Same, 149 N. Y., 174.

every one who takes through such a signature as "A. B. trustee."[1] As stated by Chief-Justice WAITE in West St. Louis Bank vs. Shawnee County Bank at 95 U. S., 559: "The very form of the paper itself carries notice to a purchaser of a possible want of power to make the endorsement, and is sufficient to put him on his guard." In the leading case of Claflin vs. Farmers' & Citizens' Bank, 25 N. Y., at pp. 294-5, it was agreed by all the Judges that the agent's signature did not bind the principal when the other party knew that it was for the agent's benefit. The only point of controversy was whether an ignorant holder could recover when the paper was negotiable. But "the want of authority," said Chief-Judge SELDEN, "to bind the bank appeared upon the face of the check."

I do not set out those authorities at length since they are so familiar and because this was so recently done in a case twice argued at this court (Phelps vs. Beard, October Terms, 1900 and 1901, on error to Lamson vs. Beard, 94 Fed. Rep., 30), and because on the reargument the correctness of our position was substantially conceded, as shown by the briefs filed.

No inquiry was made by Porter as to Bush's authority, even of Bush himself; nor would inquiry of Bush have been enough.[2]

A special exception to these general rules, however, was suggested by Judge PECKHAM in the opinion

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[1] Shaw vs. Spencer, 100 Mass., 302; Scollans vs. Rollins, 179 Mass., 346, 353.

[2] Bank of New York vs. American Dock Co., 143 N. Y., 559, 565-6; Manhattan Life Ins. Co. vs. Forty-second St. R. R. Co., 139 N. Y., 146, 151 and cas. cit.; Germania Safety Vault Co. vs. Boynton, 71 Fed. Rep., 797, 799 and cas. cit.; Dowden vs. Cryder, 55 N. J. Law, 339, 332.

of the New York Court of Appeals in Goshen National Bank vs. State of New York, 141 N. Y., 379. This suggestion was relied upon by defendant at the early stages of this litigation, and I shall discuss it somewhat at length, although it has been recently the subject of extended arguments in this Court in the case of Phelps vs. Beard, since compromised. The suggestion is that a cashier's draft or cashier's check—that is, a check drawn by one bank upon another and signed by the cashier of the former on its behalf, is an instrument so common, and partaking so much of the nature of currency, that people ought not to be expected to examine the signature for the purpose of ascertaining whether it is signed by a person who is using it for his own individual benefit. The exact language upon this point is as follows:[1] "Bank or cashier's drafts are used so enormously at the present time in the payment or settlement of debts and in other commercial transactions that they have almost acquired the characteristics of money. So long as they are drawn on behalf of a solvent bank and upon a solvent drawee, and signed by one of the officers usually signing such instruments, they are regarded by the commercial community very much the same as so much cash."

The reasoning of this case was at first thought possibly to indicate that the prior New York decisions upon the authority of bank officers and other agents to sign in their own interest were overruled, and the similar decisions of this Court disapproved. A few months later the same Court however, speaking by the same learned Judge, approves the earlier cases and places the Goshen Bank case upon a "difference in the

[1] 141 N. Y. at p. 387.

case of bank or cashier's drafts from most other cases of agency."[1]

That the remarks quoted from the Goshen Bank case were not the outcome of a very careful examination of the question involved seems to have the following indications:

First, as has since judicially been pointed out,[2] the remarks were *obiter*. The record contained a finding of fact that the cashier had authority to sign the checks, and this (assuming, as the Court did, that such authority could lawfully be given) was fully sustained by the proof, as was pointed out after an examination of the record by the New Jersey Court of Errors and Appeals in the Campbell case.

Second, the remarks of the Court are not sustained by the precedent there cited,[3] which was an action by an indorsee, and lacked the element of notice to the plaintiff that the paper was issued for the cashier's personal benefit.

As the question is one of general commercial law, this court would not be bound even by a decision of the New York courts directly in point, although it was a transaction within that State.[4]

It is respectfully submitted that there is no difference between the position of a bank cashier and that

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[1] Bank of New York case, 143 N. Y., at pp. 564-5.

[2] *Id*; Lamson vs. Beard, 94 Fed. Rep., at p. 42; Gale vs. Chase Natl. Bank, 104 Fed. Rep., at pp. 216-17; Campbell vs. Manufacturers' Bank, herewith submitted, at pp. 12-13.

[3] Phillips vs. Mercantile Natl. Bank, 140 N. Y., 556.

[4] Swift vs. Tyson, 16 Pet. 1, 18,19; Oates vs. Natl. Bank, 100 U. S., 239, 246; Pana vs. Bowler, 107 U. S., 529, 541.

of any other agent which can justify an exception to the general rule that an official signature affixed for the benefit of the signer is a danger signal, and puts the recipient upon inquiry.

In the first place, the general rule is not less necessary in the case of a bank cashier than in that of other agents, but more so. His opportunities to abuse so dangerous a privilege are not less, but greater. The probability of early discovery is certainly no greater. In actual experience, embezzlements that would be prevented by strict observance of the rule are certainly no less familiar. As said by Judge WOODS in Lamson vs. Beard, 49 Fed. Rep., at page 43: "We agree with counsel for defendants in error that the concern of the courts should not be to make it easy for persons in fiduciary positions to make way with that which is committed to their care by relaxing this salutary rule through considerations of the supposed necessities of business and commerce, and that the rule should not be suspended where the opportunities for breach of trust are largest, merely because they are large. The best public policy requires that bank officers be rigidly held to the ordinary and well established rule."

In the second place, however common and necessary are cashier's checks, the establishment of such an exception would not appreciably quicken their use in commerce. The signature must always be exa[illegible]d, for the bank issuing the check is not bound if the wrong name is signed, or if the signature is forged. The personality of the cashier must be always presented to the mind of the recipient of the paper, and the fact that it is issued in the cashier's own interest,

if known to the recipient, must also be in mind. On the other hand, it is perfectly easy for a bank to provide that checks issued for the benefit of the cashier should be signed by some other officer.

In the third place, there is no custom of receiving such checks, which would be disturbed by a present decision applying to them the general rule of agency. The invalidity of such a custom, claimed then to exist in New York, was many years since declared in a familiar opinion, often since quoted and approved.[1]

I venture to think, moreover, that no member of the Court which decided the Goshen case would have applied it to the present state of facts.

In the first place, the ground there assigned for distinguishing cashier's checks from other negotiable paper is their use as currency, like bank notes. The idea of the Court seems to be that such checks are received through clearing-houses, by mail or express, or by messenger, in such quantities that the person receiving them is not to be expected to have in mind the personality of the cashier who signs them, so as to connect in mind the signature of the check with the personal responsibility for the obligation which is being thereby liquidated. The Goshen case was a very strong one for the recipient, since the obligation liquidated by the cashier's check was that of the County of Orange to the State of New York, so that the person receiving and depositing it on behalf of the State Comptroller would be very apt to forget that the County Treasurer of Orange was personally respon-

[1] Anderson vs. Kissam, 35 Fed. Rep., at pages 701, 703; reversed on another point 145 U. S., 435.

sible for the money owed, and that he was also the cashier who signed the check. Under circumstances like those in the present case, there is no reason why a cashier's check should be differentiated from any other paper signed by an agent in his principal's name for his own benefit.

In the second place, the cashier's check in the Goshen Bank case had come back to the bank in due course and had been paid. This was the main point of the decision, the Court regarding the transaction as thereafter equivalent to an attempt by the bank to recover back cash paid out of its till. In the case at bar, the draft never came back to the Elmira Bank until after it had failed ; and the Receiver thereupon disavowed it and demanded the money.

Had the Court not treated the transaction as equivalent to a payment in currency after the draft was received and paid by the Goshen Bank, it would probably have decided in favor of the plaintiff on the ground that the State was not a holder for value parted with. The New York distinction between a holder for value in general and a holder for value parted with has not been recognized in the Federal Courts, but it is respectfully submitted that if this novel doctrine as to cashier's checks is to be adopted, it is to be adopted with the restriction which would have been placed upon it by the Court which conceived it. It would certainly be a monstrous doctrine to hold that if a bank cashier owes money, and without authority sends the check of his bank in payment, and the bank never recognizes his act, but the fraud is discovered before the check is returned by the payee, and if the payee meanwhile has parted with no value, but retains in his possession the cashier's evidence of indebtedness and

collateral securities—to hold that under these circumstances the bank must pay the debtor and settle the loss. Yet that is precisely this case. Bush's original note and securities are in the possession of the defendant.

## III.

*Assuming the existence of a course of business sufficient to permit defendant to treat Bush as having general authority to sign cashier's checks for his individual benefit, the transaction is still illegal and the defense still fails.*

It is not pleaded or proved, or claimed to be proved, or claimed to be the fact, that the Elmira Bank ever was paid or recouped in any way any part of the $15,012.50 thus withheld by the defendant, or that any of its officers or directors, other than Bush, knew of this transaction.

Defendant's claim is that Bush used the Elmira Bank account as a mere conduit through which to pass $8,000 of currency which had no earmark, and a $7,000 check of which he was apparently the owner, and that by some kind of legal reasoning the Elmira Bank was thus affected with a loss of these amounts, which really belonged to itself, as well as of the $12.50 which the defendant allowed to Bush, (apparently as a gift or commission upon the transaction).

I understand the correct analysis of the transaction, considered by itself and apart from any prior doings of Bush, to be as follows:

*(a)* Defendant must treat the whole transaction of May 5, 1893, including the deposits and the certified check, as a unit.

This is its own theory, set forth in an answer based indeed upon not entirely accurate information, but drawn by its attorneys with evident care,[1] and in the light of previous litigation on the subject.[2] The theory is necessary to its case, for in no other way could it claim to get these large amounts, admitted to have been put by it into the Elmira account, out of that account again.

Judge SHIPMAN, in charging the jury, adopted precisely the opposite theory, saying[3]: "I put the case as though when Bush came in with his bag containing $8,000 in currency and $7,000 in a draft, those two, the currency and the draft, had been received by Porter and credited upon the note, and this form, this illegal, improper form of taking Bush's individual check and having it certified by himself as cashier, had not been gone into."

I submit that this theory, which underlies the entire charge to the jury, is untenable, not only because it is inconsistent with the answer, but also because it is inconsistent with the facts and the law.

The first trouble with the learned Judge's theory (apart from its inconsistency with that to which the defendant had deliberately committed itself) is that, far from receiving the currency and the draft and crediting them upon the note, *Porter did not accept the tender. He rejected it.* He rejected it because he would

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[1] Record, p. 12.
[2] pp. 15, 30, 98.
[3] p. 106.

not permit his own bank to accept the draft as the equivalent of cash. This was not on account of the irregularity on the face of the draft, but because it was drawn on a bank in Philadelphia, which he refused to credit. Having elected at the time to refuse the proposition which it claims Bush made, the bank cannot now retrace its steps.

Furthermore, if the entire transaction is not to be regarded as a unit, then the result is that there were two different transactions, one by which certain assets of the Elmira Bank were deposited in the Elmira Bank account, and the other by which a check against that account was certified. The latter transaction is admitted to be "illegal, improper." It therefore falls, and the former alone remains.

It was this peculiar theory of the judges below which caused them upon the first writ of error in this case to hold that a verdict should have been directed in behalf of the plaintiff for the sum of $7,012.50 only.

The plaintiff joins with the defendant in contending that the transaction testified to by Porter, if considered at all, is to be considered as a unit. Plaintiff absolutely disavows the transaction and demands his rights upon that theory. Plaintiff is entitled to the moneys which were unlawfully taken and withheld from the Elmira Bank.

(*b*) The best evidence of the real transaction is of course to be found in the entries of it upon defendant's books, made at the time, and in the original papers. The entries, together with an explanation of the bank's system of bookkeeping, are to be found at pp. 20, 81, 82, 83.

The entries are indeed not complete. There ought

to be a deposit slip, a deposit letter, or a cash entry upon the duplex book, but there is none. Enough is to be found, however, to destroy defendant's case.

The date of the transaction, as fixed by Porter, was May 5. On that day the Elmira Bank is credited in the general account with $8,000 currency (of which amount there is no original entry), and debited with a $15,012.50 draft (which is shown by the duplex book to have canceled Bush's note). *These are the only cash entries of that day with reference to the transaction.* At the end of that day, therefore, the books showed that the Elmira Bank had deposited $8,000 currency, and had given Bush a draft for the purpose of paying his debt to the defendant. There was no entry connecting the currency with the draft in any way, or indicating that the deposit of the currency was for any special purpose.

On the same day appears a $7,000 entry in a book endorsed "Time Collections," containing "the original entries of drafts deposited by the Elmira National Bank for collection." Here again there is nothing connecting the entry with the $15,012.50 draft, or indicating that the deposit was for any special purpose. A subsequent entry on the collection book shows that the item was "paid May 8." On that day for the first time it was credited to the Elmira Bank in the general account. Porter gives his explanation of the matter in his testimony.[1] He says: "Collection in banking parlance means that an item is not credited until you get the money for it." Otherwise, he says, the bank would be paying interest on an item which is not yet

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[1] Record, pp. 28–9; and compare Metropolitan Bank vs. Loyd, 90 N. Y., 530.

cash in its treasury. In other words, *the $7,000 entry was not a balance against the $15,012.50 entry, since in that case there would have been no mistake in crediting it the same day, and letting it draw interest for the same period.*

This $7,000 item was the draft on the Quaker City Bank, and examination shows that it was payable to the order of Bush as cashier, not individually—in other words, that it was upon its face, and was represented by defendant to the Quaker City Bank to be, the property of the Elmira Bank.[1]

No $12.50 entry of credit to the Elmira Bank is to be found.

Thus there is nothing on the books showing that the $15,012. 50 debit was balanced by, or connected with, any of the items of credit whatsoever; that it represented any special deposit, or was part of any conduit.

The allegations of the answer were thus contradicted by the proof offered in their support, and in the absence of help from its books the defendant offered the singular story told by its late vice-president, Mr. Porter, which we have very fully set forth in our statement of the case.

*(c)* The defendant is bound by its own book entries. It elected how to treat the transaction, and can no more change its position after the insolvency of the other party than it could revoke an election between contract and tort, or an election as to the appropriation of a payment.

*(d)* The transaction as testified to by Porter was unauthorized.

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[1] Record, pp. 25, 30; Bank of Genesee vs. Patchin Bank, 19 N. Y., 312.

In the first place, there can be no doubt that no cashier is authorized to agree that his bank's account be used without its consent to pass anybody's checks through for his own benefit, or indeed for the benefit of anybody else, when the bank is not interested in the transaction. Hence Porter's proposition was one which Bush had no right to accept.

Nor had Porter any right to permit such manipulation of the account of a depositor. No bank has the right to allow a depositor's account, without his permission, to be drawn upon by somebody else. A depositor's funds can be paid out "only in the usual course of business and in conformity to his directions;" only "at the time when, to the person whom and for the amount authorized by him."[1] A depositor has the right to insist that his account with the bank shall not be obscured or complicated by being used for the convenience of other people's pecuniary transactions, without his own consent; and that he shall not be obliged to examine and audit other people's pecuniary transactions and vouchers in which he has no interest. A single transaction of this kind would probably occupy as much of the depositor's time and mental effort as all the other transactions in his account for the period of audit.

To allow one individual to tamper with another individual's bank account is not a bit more objectionable than to allow a bank cashier for his individual advantage to tamper with the account of his bank. No such

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[1] Crawford vs. West Side Bank, 100 N. Y., 50, 53; Citizens' Bank vs. Importers' & Traders' Bank, 119 N. Y., 195, 200; Shipman vs. Bank of the State of New York, 126 N. Y., 318, 326-7; 2 Daniel on Negotiable Instruments, Sec. 1613; Smith vs. Brooklyn Savings Bank, 101 N. Y., 58, 60.

transaction can be regarded as in the course of any lawful business. Both parties to it act at their peril. We concede of course that, as this Court remarked, the Elmira Bank could not afterward recover from defendant the amounts deposited, if they had really belonged to Bush. This would not be, however, because its rights had not been violated, but because it had suffered no damage. The transaction still, as this Court said, " would have been irregular "—that is, would have been outside the due course of business, and a breach of the contract between the two banks.

I have not found any record of its ever before being claimed that a bank could permit other persons than the depositor to draw moneys out of the account. If other persons persuade the bank teller that they have oral authority, and if he yields to their persuasions, it may be that the depositor will ratify his act. and absolve him and the bank from liability for the irregularity. But if neither prior authority nor subsequent ratification be shown, the bank is responsible to the depositor.

The Courts below seem to have thought that each deposit in a bank account lies separate from each other deposit, and can be drawn off separately. Hence they infer that the $7,000 and the $8,000 put in by Bush lay upon the rest of the account like the upper layer of a *pousse café*, so that they could be drawn off from the top of it without disturbing the depositor at all or his prior deposit (except the $12.50 which somehow came off too).

This, I submit, is not the legal result of a bank deposit. Every deposit in an account, when it is accepted by the bank as cash, becomes the property of the bank, which becomes the debtor of the depositor to that amount ; but the debt does not remain a separate

one. The amount deposited is simply added to the general indebtedness of the bank, nor have I been able to find any precedent for its separate recovery by the depositor.

Defendant's counsel argue that if Smith is allowed to deposit money in Jones' account without Jones' knowledge, Jones cannot claim that it becomes his money; and that if Smith is allowed to draw it out again, signing Jones' name to the check by himself as attorney, Jones cannot claim that his funds have been diverted. It may be that Smith can get his money back in some way or other, notwithstanding that his payment is voluntary and therefore not recoverable on the ordinary lines of an action for money had and received, and notwithstanding that such a check would be little better than a forgery. It is sufficient for the purposes of the present case to say that the whole proceeding is so gross a violation of business and legal proprieties that the bank is not protected if Smith be an embezzler, and that Smith can certainly in no form of action, and by no kind of check, be able to get out any money *that is not his own.*

In the second place, sufficient funds were not deposited by Bush to balance the amount withdrawn, for three days thereafter the account remained $7,012.50 short.[1] Ever since it has remained $12.50 short, as the trial Judge conceded in directing the verdict.

If a bank may permit Smith, its favored friend, to draw $7,000 from the interest-bearing account of Jones, its depositor, without Jones' consent, for three days, may it do so for a year? If not, where is the line to be drawn?

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[1] See *supra*, p. 35.

If it may permit Smith to help himself to $12.50 out of Jones' account, may it let him have $1,250? If not, where is the line to be drawn?

In the third place, risk was cast upon the Elmira Bank, without its consent, which defendant was unwilling itself to run.

In this case the risk forced upon the Elmira Bank without its consent or knowledge was the risk of collection in panic times from a bank whose solvency, or at least immediate solvency, was doubtful. The fact that, as it happened, the Philadelphia bank turned out to be solvent and prompt, cannot affect the situation of the parties when Bush met Porter. The future was not then known. It was known that it was a risk; that it was a risk which defendant would not take; and that it was a risk which Bush at the suggestion of defendant threw upon the bank which trusted him.

The position of defendant's vice-president and counsel is this: "Jones has an account in a bank. Smith owes the bank $7,000. Smith brings the bank a check for $7,000 drawn on another city. The bank says to him: 'We will not take that check. It is quite likely never to be paid, and very probably not going to be paid for so long that considerable interest will have run against it, and we cannot meanwhile make it the basis of profitable transactions. The check is not worth $7,000 and would only be accepted as cash at a big discount.' Smith then says: 'What can I do? I have not got anything to pay my debt with except this check.' The bank then said: 'Well, while we won't take it, because it is not worth $7,000, we will thrust it down the throat of Jones, and make him take it at that amount. You deposit it in Jones' account and sign Jones' name to a check for $7,000; and as he has

more than $7,000 already in his account, we will cancel your debt.' The bank then does cancel the debt—that is, on its books, keeping the evidence of debt and the collateral, however, in its possession, just the same as before—but does not credit the check deposited to Jones. What can be fairer to the innocent, ignorant and confiding Jones than this transaction ? "

Upon the fairness of the transaction we comment no further. A word more may be said, however, about the difference between a credit as cash and a credit "for collection." A deposit for cash transfers the title to the check, so that the bank receiving it becomes a creditor of the depositor, while a deposit for collection does not pass title to the check, the bank holding it during process of collection as the depositor's agent.[1] When checks are received on deposit as cash, an absolute right to draw against them is given.[2] When a check is deposited as cash, its amount swells the account of the depositor. The depositor can sue the bank for damages if it dishonors drafts upon it for an amount not greater than that of the account thus swelled.[3] No such result follows when the deposit is not received as cash; when it does not appear in the general deposit account of the depositor at all; when it is merely noted in some other account as a piece of paper received "for collection." Nobody ever claimed that the depositor could draw against it under these cir-

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[1]Metropolitan Bank vs. Loyd, 90 N. Y., 530; National Butchers and Drovers' Bank vs. Hubbell, 117 N. Y., 384, 393.

[2]Manufacturers' Bank vs. Continental Bank, 148 Mass., 553; Metropolitan Bank vs. Loyd, *supra*, at page 535.

[3]Citizens' Bank vs. Importers' & Traders' Bank, 119 N. Y., 195; Bank of the Republic vs. Millard, 10 Wall., 152, 156; St. Louis Railway Co. vs. Johnston, 133 U. S., 566, 574.

cumstances, and that if his draft was dishonored he could sue the bank for damages.

Hence, the Elmira Bank, had its account previous to these deposits stood at zero, could not, either legally or by the customs of banking, have drawn more than $8,000 on May 5, 1893. Under what authority could the defendant have given Bush the right to draw $7,-012.50 more in the name of his own bank than his own bank would have been permitted to draw ?

But really the Elmira Bank had already more than $7,012.50 to its credit with defendant ; and *it was $7,-012.50 out of this fund, and not out of any moneys deposited by Bush, which Bush was so kindly permitted to draw out.*

*(e)* Hence, the transaction was not in due course of business, but irregular, fraudulent and criminal.

As a whole, it was unprecedented as well as unbusinesslike. So far as it involved a proposition by Porter and agreement by Bush that the Elmira Bank should be subjected without its knowledge to the risk of collecting from Philadelphia a part of what it was then losing, it was in gross bad faith. So far as it deprived the Elmira Bank of the overplus beyond the amount of the deposits, and of interest on one of the deposits, it was a fraud. So far as it involved the certification of a check without first entering it upon the books of the Elmira Bank, so as to cut off further drafts on Bush's account until it was made up for, it was a crime.[1]

*(f)* The transaction not being in due course of busi-

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[1] See, *supra*, page 23.

ness, Porter was not excused from inquiry either as to the $7,000 draft or as to the $8,000 currency.

Neither the Goshen Bank case nor any other case has ever held that either negotiable paper or currency may be retained by the recipient as against the true owner except when received in due course of business. That is a limitation, sometimes expressed, sometimes implied, upon every statement of the rules which legalize the transfer of A's money to B's pocket without A's knowledge or consent.[1]

*(g)* And finally, the defendant is estopped from basing any contention upon the fact (if it be a fact), that the $7,000 Quaker City draft was payable to Bush individually when first tendered by him. It is estopped from denying what it represented to the Quaker City Bank and to the Elmira Bank itself to be the fact, that it was payable to Bush as cashier, and, therefore, the property of the Elmira Bank.

By endorsing the draft in this form and presenting it for collection to the Quaker City Bank, defendant represented it to be correct in every respect. The draft was so large a one that it was likely to receive close scrutiny by the bank upon which it was drawn. A draft of $5,000 and upwards is called a "large draft," and submitted personally to the higher officers, even by the defendant bank with its immense business and its corps of 100 men.[2]

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[1] See Goodman vs. Simonds, 20 How., 343, 365; Stephens vs. Board of Education, 79 N. Y., 188, as quoted in Holly vs. Domestic & Foreign Missionary Soc., 180 U. S., 284, 293, and other cases cited in s. c., 92 Fed. Rep., 745; Thompson vs. Sioux Falls Bank, 150 U. S., 231, 239.

[2] Record, pp. 27, 31.

It would have been most proper for the Quaker City Bank, as the Philadelphia depositary of the Elmira Bank, to look carefully at large drafts purporting to be drawn upon it by its depositor, in order to ascertain whether they were drawn by duly authorized officers. Had this draft not been altered, it is very probable that it would have been made the subject of inquiry by the Quaker City officers—an inquiry which would have brought the whole unlawful transaction to the attention of the Elmira directors while the matter was still remediable without loss to anybody. They could at once have disavowed the draft, or forced Bush to make it good; while defendant still held Bush's note and collateral, and was in no worse position than before.

I have never up to this time been able to obtain the slightest judicial attention to this feature of the case, and yet I respectfully submit that it is conclusive.

## IV.

*There was no prior course of business sustaining Bush in drawing a cashier's check for his individual benefit.*

Sustaining my first and second points, but overruling my third point, the learned judges of the Circuit Court of Appeals have regarded the existence or non-existence of a prior course of business, by which the cashier was wont to draw bank drafts to his own order or for his individual purposes, as the turning point of the case.

They have held that although no estoppel was claimed by defendant, and although there was no actual

authority, nevertheless by some reasoning—and upon the reasoning they are not agreed—if a cashier on a few prior occasions has drawn checks to his own order, no matter how small, and if they have been returned to the bank without being discovered and objected to by the directors, the bank and its creditors are thereafter debarred from objecting to any unauthorized check of the same sort, no matter how large.

This question turns upon elementary principles of the law of agency.

I respectfully submit that the evidence adduced in this case in support of the claim of "course of business" should have been absolutely excluded from the consideration of the jury for the following reasons

*(a)* That no one is bound by the acts of his agent, except upon the theory either of actual authority (express or implied, prior or by ratification) or of estoppel, and in particular that actual knowledge by the principal must be shown to establish actual authority, while negligence of the principal is not alone enough to establish agency by estoppel.

*(b)* That there is no actual authority here shown.

*(c)* That there is no estoppel here shown.

*(d)* That, even if the Elmira Bank directors were shown to be negligent in not discovering and reproving Bush's prior acts, that would not entitle defendant to base any claim upon them.

*(e)* That the directors are not shown to have been negligent.

*(f)* That, if the directors had known of the prior acts, and authorized or ratified them, their authority or ratification would not have bound the bank, still less its creditors.

*(g)* That there are not sufficient prior instances shown to take the case to the jury.

These propositions I will now take up separately:

*(a)* Judge SHIPMAN, upon the first hearing at the Circuit Court of Appeals, sustained the evidence of "course of business" upon the theory of "implied authority, which was to be inferred from the alleged acquiescence of the Elmira Bank in his prior assumption of authority."[1] He conceded at the second trial, upon the new evidence then elicited, that there was no express authority and no evidence of actual knowledge.[2] He had conceded in the appellate tribunal that there was no estoppel in favor of the defendant,[3] and no evidence upon the second trial affected this feature of the case. The two judges who sat at the second hearing in the Circuit Court of Appeals affirmed upon the former opinion, but one of them has since abandoned the theory of "any implied authority," and taken up that of a *quasi*-estoppel.[4]

I respectfully submit that there is neither sound principle nor any precedent binding upon this Court or of sufficient weight to control its decision, holding,

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[1] 104 Fed. Rep., at p. 216.

[2] Record, pp. 110, 111.

[3] 104 Fed. Rep., at p. 219.

[4] LACOMBE, J., in Campbell vs. Manufacturer's Bank, submitted herewith, at pp. 4–6.

in the case of acts neither actually nor apparently for the benefit of the principal, that his authorization can be inferred when those acts are unknown to him, or that his negligence binds him when the elements necessary to constitute an estoppel are wanting.

Defendant relies on cases of agency by estoppel, and on cases where a general agency with uncertain limits exists, and where acquiescence of the principal in notorious acts of the agent has been held to extend those limits beyond where, in the absence of such acquiescence, the Court would have placed them. Most such cases, however, are based upon acquiescence in acts which either actually or apparently are for the principal's benefit. Few, and none, I submit, with any support in reason or precedent, have so held when there was no estoppel and when the acts were beyond the natural limits of any general authority, and neither actually or apparently for anybody's benefit but the agent's.

The latest American text writer, Prof. Huffcut of the Cornell University Law School, divides agencies into those by agreement, by ratification, by estoppel, and by necessity.[1] As to the agency by estoppel, he points out that the five elements of estoppel must all exist in the case, including the element that the third party "must actually be induced to act, relying on the representation"; [2] and says that "the doctrine is the general doctrine of estoppel." [3]

In discussing ostensible authority, Mr. Huffcut says (§ 103): "In order to work an estoppel against the

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[1] Huffcut on Agency, § 9.
[2] *Id.*, § 53, citing Bigelow on Estoppel (5th Ed.), p. 570.
[3] *Id.*, § 106.

principal based upon the holding out of an agent as possessed of authority, it is necessary that the third person should have relied in good faith and prudently upon the appearance of authority thus created."

The latest English text writer states the principle as follows: "Where a person by words or conduct represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of such other person *with respect to any one dealing with him as an agent on the faith of any such representation*, to the same effect as if he had the authority that he was represented to have." [1]

Mr. Ewart, in his recent interesting work on the law of estoppel, puts as the text of a chapter[2] the following statement of Lord Justice JAMES in *ex parte* Adamson, L. R., 8 Ch. Div., 807, 817-8: "Nobody ought to be estopped from averring the truth or asserting a just demand unless by his acts or words or neglect his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something, or to abstain from doing something, by reason of what he had said or done, or omitted to say or do." Mr. Ewart adds: "Change of position to misrepresentation bears somewhat the same relation as consideration to contract." In applying the rule to the case of principal and agent, he lays down the following propositions:[3] "1. A man cannot

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[1] Bowstead on Agency, Art. 85; see, also, Mechem on Agency, § 84.

[2] Ewart on Estoppel, p. 131, citing also more recent authorities; see also pp. 140-1, discussing Heane vs. Rogers, 9 B. & C., 577, 586, and pp. 182-3, quoting 2 Pomeroy's Equity Jurisprudence, § 803.

[3] *Id.*, p. 473.

be bound by the act of another unless he authorized it.[1] 2. Nevertheless, if he personally represents that he has authorized it and on the faith of that representation some third party has changed his position, he ought to be estopped from denying the existence of authority. In such case the act was, and remains, unauthorized. 3. Assisted misrepresentation will also estop: If the ostensible agent is the one who makes the representation of authority, and the supposed principal has merely assisted that representation—done that which has made it credible—he will be as much estopped as if he had himself made the representation." Quoting Lord CRANWORTH[2] to the effect that the third party "must show that the agency did exist, and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it," Mr. Ewart adds:[3] "In other words, you must prove agency and extent of agency, or else estoppel—agency or estoppel; fact or preclusion to deny fact."

Mr. Daniel gives the same rule in the special case of negotiable paper issued by an agent: "But when it is sought to bind the principal on the ground of prior similar transactions or recognition of such acts by the principal, *it must be shown that the bill or note was taken upon the faith of them.*"[4] The other recent writers on commercial paper are to the same effect.[5]

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[1] "Ratification as a ground of liability is not within the scope of the chapter." *Id.*, p. 473, note.

[2] In Pole vs. Leask, 33 L. J., Ch. 155, 162 (H. L.).

[3] Ewart on Estoppel, p. 487.

[4] 1 Daniel on Negotiable Instruments, § 297.

[5] Tiedeman on Commercial Paper, § 79; 1 Randolph on Commercial Paper, § 363. See also the very clear statement of the difference between actual and ostensible agencies in the California Civil Code, §§ 2298-2300, 2315-7, 2334.

This rule is very clearly set forth by Mr. Chitty as follows: "An authority may also be implied and inferred from prior conduct of the principal, for a special authority is not necessary to constitute a power to draw, indorse or accept by procuration, but the law may infer an authority from the general nature of certain acts permitted to be done, * * * and it has been held that if a person usually subscribes an instrument with the name of another, proof of his having done so in many instances is sufficient to charge him whose name is subscribed, without producing any power of attorney. * * * *But it must appear that the bill or note is taken upon the faith of prior similar transactions;* and therefore the holder of a bill purporting to be, but not in fact accepted by the person to whom it is addressed, cannot recover against the apparent acceptor by proving a fact *subsequently* discovered, that on a former occasion the defendant had given a general authority to the person who accepted in his name to accept bills for him; *to make such authority available, the holder must show either that the authority remained unrevoked at the time of the acceptance, or that he took the bill on the faith of such authority.*" [1]

The leading case is Cash *v.* Taylor, 8 L. J., K. B., 262, decided in 1830. Defendant was sued upon an acceptance signed in his name by his brother-in-law. It was shown that similar acceptances had been paid by defendant to third parties, but plaintiff did not know this when he took the paper. Lord TENTERDEN left it to the jury simply to decide whether the

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[1] Chitty on Bills, pp. 31–2.

brother-in-law was authorized to accept the bill in question, and the Court *in banc* sustained him.

The principle is fully recognized in New York. In the famous Schuyler case[1] Judge DAVIS said: "The doctrine of implied agency, when it arises out of negligence, I think has its true basis in the principle of estoppel *in pais*." The leading case there is People vs. Bank of North America, 75 N. Y., 547, 561, involving the question whether the State was chargeable at suit of defendant with certain drafts endorsed by one Phelps, the cashier in the office of the State Treasurer. It was proved by defendant that Phelps had made similar endorsements upon *fifteen* other drafts besides the one in question. Judge EARL, among other grounds of decision, said that assuming that there would have been an estoppel in favor of the banks which had taken those fifteen drafts, "the facts constituting such estoppel were unknown to the defendant, and in no way influenced its action;" adding, "It is said also that the facts which existed in and about the treasurer's office and the relations and dealings between Phelps and the treasurer, were such as to give Phelps *apparent* authority to make these endorsements, and hence that the State is bound by them. *Apparent* authority operates *only by way of* estoppel, and can take the place of real authority only when some person has acted upon the appearances"[2].

In Fifth National Bank *v.* Navassa Phosphate Co., 119 N. Y., 256, relied upon by defendant below, it was

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[1] N. Y. & N. H. R. R. Co. vs. Schuyler, 34 N. Y., at p. 53.

[2] To the same effect see remarks of ANDREWS, J., in Walsh vs. Hartford Ins. Co., 73 N. Y., 10, quoted by RUGER, C. J., in Bickford vs. Menier, 107 N. Y., 490, 494; Blass vs. Terry, 156 N. Y., 129, 129, 130.

admitted that, in the absence of an estoppel, knowledge on the part of the directors must be proved in order to establish a course of business. This the Court said was "the real difficulty," but as there was some evidence of knowledge it was held a case for the jury; for, if the principal knew and acquiesced, thus affording an actual implied authority, it was of course immaterial whether the other party knew of it or not. Authority from knowledge and acquiescence, like other kinds of actual authority, needs no estoppel to rest upon. Defendant also put some reliance in this connection upon remarks of Judge VANN in Hanover Bank *v.* American Dock and Trust Co., 148 N. Y., 612. That case, however, as shown by the final paragraphs of the opinion, turned upon the question of actual authority—whether the "jury would have been warranted in finding" that the prior instances "had come to the knowledge of the directors;" whether they "might have been satisfied that the directors knew that Stone was occasionally creating obligations," &c. (pp. 623–4).

The rule for which I contend was clearly recognized by the Circuit Court of Appeals in Lamson vs. Beard, 94 Fed. Rep., 30.[1] In Mining Co. vs. Anglo-California Bank, 104 U. S., 192, relied upon by defendant below, the case turned on knowledge, not which the directors *ought* to have had, and which they "must be *presumed* to have had," a presumption which, "if not under the special circumstances of this case conclusive [that is, it would seem, when there is an estoppel] might

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[1]See findings at 94 Fed. Rep., 33, and opinion of WOODS, J., at p. 41.

have been overthrown by affirmative proof of want of authority, express or implied."

The authorities elsewhere fully support the contention that there is no such thing as a binding ostensible authority in the absence of actual authority, express or implied—that is, in the absence of any knowledge on the part of the principal—except in favor of a party who is able to assert an estoppel[1]. Thus in Murray *v.* Nelson Lumber Co., 143 Mass., 250, the contract in suit was made by the president of the company, and was known to one other director. The question for the jury was whether there had been ratification of this contract by acquiescence. The trial judge charged that the jury might assume the directors "to know what it is their duty to know, what they are able to know." This was held to be error. MORTON, C. J., said: "The burden is upon the party who relies upon a ratification to prove that the principal, having such knowledge, acquiesced in and adopted the acts of the agent. It is not enough for him to show that the principal might have known the facts by the use of diligence. * * * In the case at bar, therefore, it was incumbent upon the plaintiff to show that the directors, or at least a majority of them, knew of the contract and its terms. * * * But the instructions given by the court gave to the jury a different test. Under them, the jury would naturally understand that it was not necessary to find that the directors knew of the contract, but

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[1]See for instance St. John vs. Redmond, 9 Porter, 428, 432-3, and Rawson vs. Curtis, 19 Ill., 456, 474-5, cited in 1 Randolph Comm. Paper, §363; Lord CRANWORTH in Bank of Ireland vs. Evan's Charities, 5 H. L. C., at page 413.

that it would be sufficient if, in their judgment, the directors, by the use of diligence, might have known it."

The action of the Court below was avowedly based upon language used by Mr. Justice HARLAN in Martin vs. Webb, 110 U. S., 7 ; and in his recent statement of the rule deplored by him, but regarded as based upon authority, Judge LACOMBE used language taken from that case[1]. But "read in the light of the facts of the case," as opinions of this Court must be[2], the language does not bear the meaning attributed to it. The learned Justice himself gives this caution : "We have stated with some fullness the circumstances disclosed by the record, *so that the general expressions in this opinion may be interpreted by the facts of this case.*" Now the Martin case did not concern acts of the cashier which were illegal or against public policy or for his own benefit. It concerned acts which ordinarily indeed are not performed by the incumbent of that office, but which were, so far as appears, performed in good faith and in the interests and for the benefit of the bank. They related to certain loans secured by deeds of trust. The majority of the directors were absentees. They knew that the cashier was taking entire charge of the matters connected with the deeds of trust, and never attempted to look into his transactions. The cashier "understood, and from the conduct of the directors had reason to understand, that he was in-

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[1]Campbell vs. Natl. Broadway Bank, herewith submitted, at page 5.

[2]Cohens vs. Virginia, 6 Wheat., 264, 399 ; Barney vs. Rickard, 157 U. S., 352, 364 ; Pollock vs. Farmers' Loan and Trust Co., *Id.*, 429, 574.

vested with full authority to manage the operations of the bank according to his best judgment and without disturbing the directors." During seven years he satisfied, upon the authority so derived, more than 150 such deeds of trust. After this the bank undertook, upon the claim that he was unauthorized, to repudiate a new note taken by him and secured by a new deed of trust, and to revive an original debt and the trust deed given therefor, which had been by him cancelled—and this without returning the money which had been received by the transaction. As said by the Court, to permit this "would be a mockery of justice." There was a complete estoppel upon the bank, and overwhelming proof of actual authority through general knowledge that the cashier was continually engaged in transactions of this nature, and acquiescence therein. The discussion of the Court was not directed to a situation where there is neither authority or estoppel. The remark concerning what the directors "ought to have known as to the general course of business" relates to dealings with persons who have actually dealt in reliance upon that course of business: "That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

An attempt was made upon this trial to show that Bush ran the Elmira Bank as fully as the cashier in the Martin case ran his bank. The attempt was unsuccessful. Bush said that the president, one director named and himself "had more to do with the running

of this bank than any of the others," and that his own management was "so generally in accord with the management of the bank that no one interfered," but said positively "It was not a fact that all of those details were practically entrusted to my sole judgment. Our board of directors had an examining committee to pass on all our loans. We had an auditing committee who looked over our books, and occasionally lines of loans would be cut down."[1] The regular appointment and attendance of the committee has already been set forth.

*(b)* That there is no express authority shown for any of the prior drafts used by Bush for his own benefit is conceded; and that there is no implied authority shown results from the conceded fact that no actual knowledge is shown.[2] Of course, ratification, like original authority, implies knowledge.[3] "No doctrine is better settled, both upon principle and authority, than this: that the ratification of an act of an agent previously unauthorized must, in order to bind the principal, be with a full knowledge of all the material facts."[4]

Defendant in order to establish implied authority had the burden of proving that the facts were known to the directors; but in order to exclude any inference from the fact that some of the instances could have been discovered by the directors if they had examined

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[1] Record, pp. 51-2.

[2] Record, pp. 110, 111.

[3] Mechem on Agency, § 129 and cases cited; Titus vs. Cairo Co., 46 N. J. Law, 393, 420.

[4] Owings vs. Hull, 9 Pet., 607, 629; Bennecke vs. Insurance Co., 105 U. S., 355, 360.

all of the returned checks, plaintiff proved affirmatively upon the second trial, that it was not the practice of the directors to do so, and that in fact they had not discovered Bush's signatures, calling for that purpose one of the supervising and examining committee who had attended at all the examinations made during the period in question.[1] It was proper for the directors to leave the examination to a committee. The witness' testimony was unquestioned and in support of the legal presumption, and there was no necessity of cumulating evidence by taking the depositions of the other gentlemen present at the committee meetings, or of the directors who had no specific duty in the premises.

*(c)* That there is no estoppel is conceded. Porter, who acted on behalf of the defendant, does not claim to have had in mind any prior instance of Bush's signature, nor that any prior instance was known to him. In this respect the record is the same as upon the first trial.[2]

*(d)* That negligence of the directors is no defense to a party not able to claim an estoppel in his favor has already been shown.

Judge LACOMBE, is his latest discussion of the subject,[3] puts such a defense upon the theory that if the directors have been negligent and failed to stop the cashier from signing for his own benefit, they induce persons taking the checks to be less careful about scrutinizing his authority; but that theory is only

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[1] Record, pp. 44, 45-6, 88-5.

[2] See Gale vs. Chase Nat. Bank, 104 Fed. Rep., at p. 219.

[3] Campbell vs. Natl. Broadway Bank, herewith submitted.

applicable when the negligence of the takers is induced by the negligence of the directors—when, in other words, there is an estoppel.

Defendant is basing itself upon the very slight, if any, negligence of the Elmira directors in not carefully scrutinizing every signature on the smallest check and comparing it with the name of the payee. Defendant's vice-president was far more negligent in permitting such a transaction without the inquiry which, with telephone connection, would have been so easy. His negligence in this respect is an answer to his bank's position in two ways. It is contributory negligence,[1] and it is the proximate cause of the loss, while the plaintiff's negligence, if any, is remote.[2]

*(e)* There is no evidence justifying the submission to the jury of the question whether the directors were negligent in not examining the signatures.

To justify sending a question to a jury there must be some evidence strong enough to sustain a verdict in favor of the party having the affirmation.

If the directors were negligent in not examining every five-dollar draft signed by Bush in order to see whether it was properly used, they were of course pecuniarly responsible for the loss caused by consequent failure of the Receiver to collect the demand here in suit. Was their duty not performed sufficiently well when they ascertained that all drafts issued by the bank had been paid for? If their failure to find that the

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[1] New York Iron Mine vs. Negaunee Bank, 39 Mich., 644, 656, per COOLEY, J.

[2] Scholfield vs. Earl of Londesborough [1895], 1 Q. B., 536, and cases cited (affirmed on other grounds 1896, App. Cas., 514).

cashier, on an average of four times a year, has issued a small draft to his own order, for his own purposes, and paid for it, subjects the bank to loss in case of his subsequent embezzlement of the largest amount, how many bank directors are unwittingly running up against themselves or their executors gigantic obligations? How many banks in the United States have their vouchers audited with such minuteness? How many would lose valuable directors if such an expenditure of time and labor were known to be a requirement of the office?

Even the cashier of the defendant bank is not expected to examine all checks under $5,000 that pass through it.[1] The Elmira Bank was smaller, of course; but if its standard of a large draft, requiring personal attention, had been as low even as $500, only one precedent would have come to the attention of its directors.

*(f)* But the directors of the Elmira Bank were themselves without power to give Bush general authority to issue bank drafts in his own favor.[2]

This is a question which is up to this time unsettled in the Federal Courts. These Courts have sometimes for purposes of discussion considered whether, in given cases, bank directors have estopped their bank from denying the existence of a general authority; but they have always until now ended by concluding that, in the particular cases under consideration, there was no estoppel, and by giving judgment in favor of the bank, so that the fundamental question did not

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[1] Record, p. 31.

[2] This subheading is substantially a copy of the brief submitted to this court by the undersigned in Phelps vs. Beard, at October Term, 1900.

require discussion. So far as the Federal cases bear upon this question, the nearest is Anderson *vs.* Kissam, 35 Fed. Rep., 699, 701, 703. It was there held that a general usage of all the banks of New York City, recognizing a general authority in bank cashiers to sign bank paper for their individual purposes, was contrary to public policy and illegal. If this general usage of all banks is illegal, certainly a corresponding special usage of a single bank is equally illegal; for if the directorate of a single bank may establish a custom giving their own cashier any particular authority, all the directorates of all the banks may join in establishing a general custom giving that authority to all cashiers. The Kissam case was reversed on another point (145 U. S., 435) and then compromised.

Such cases as Martin *vs.* Webb, 110 U. S. 7, above discussed at length, have obviously no bearing upon the present question. They hold that the directors, by sufficiently long acquiescence in a course of business adopted by a cashier, may impliedly confer upon him an authority not ordinarily pertaining to his position. The authority thus conferred, however, is perfectly lawful and proper, and might unquestionably have been conferred beforehand by a resolution duly entered upon the minutes. These cases do not touch the question whether directors may grant an authority so broad, so unnecessary, and so dangerous to the safety of their corporation, as to contravene the policy of the law.

There is little discussion of the question in the State Courts. The New York decisions have assumed without discussion that the principle of such cases as Martin *vs.* Webb is applicable, and have

given the doctrine of acquiescence in an illegal course of business a most extreme application.[1] Missouri, on the other hand, lays down the rule that "there can not be a course of dealing in reference to illegal acts," and that when a corporate agent assumes to represent his company where his own interests are adverse, there can be no ratification without knowledge "of the facts of the particular transaction."[2]

I submit two propositions:

First, that the question to be decided is, in effect, whether the Board of Directors, by resolution operating *in futuro*, can give to the president or cashier a *general* power to issue bank paper for his own benefit.

Subsequent ratification, whether by acquiescence in a "course of business" or otherwise, can be no broader than prior authority by express grant *in futuro*. The maximum is *omnis ratihabitio retrotrahitur, et priori mandato equiparatur*.[3] "A ratification is, in its effect upon the acts of an agent, equivalent to the possession by him of a previous authority."[4] "A ratification can have no greater force than a previous authority."[5] "If the ratifier could not have given legal authority for the

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[1] Hanover Bank *vs.* American Dock and Trust Co., 148 N. Y. at p. 623, per VANN, J., but as above remarked, the last sentences of the opinion indicate doubt, unless knowledge of the directors is proved.

[2] Mercantile Ins. Co. *vs.* Hope Ins. Co., 8 Mo. App., 408, 411; Lee *vs.* Smith, 84 Mo., 304: see also Iowa Bank *vs.* Black, 91 Iowa, 490, 496, and Judge GARRISON'S opinion in Campbell *vs.* Manufacturers' Bank, herewith submitted at p. 15.

[3] STORY, J., in Fleckner *vs.* United States Bank, 8 Wheat., 338, 363.

[4] Marsh *vs.* Fulton County, 10 Wall., 676, 684; see also Bloomfield *vs.* Charter Oak Bank, 121 U. S., 121, 135–6; Park Hotel Co. *vs.* Fourth Natl. Bank, 86 Fed. Rep. 742, 747.

[5] Daviess County *vs.* Dickinson, 117 U. S., 657, 665.

act, the adoption of course could not render it any more valid than previous command could have done." [1]

It may be added although not necessary to the present controversy that as bank directors have no power to ratify a course of business, the bank cannot be estopped by their assent or inaction. This is because persons dealing with the bank are bound to know the limitations of the directors' power—that is, limitations not imposed by peculiar provisions of the charter and by-laws, but common to all similar directorates, and imposed by law. "The authority implied from a public holding out, tacit acquiescence, or usage and ordinary course of dealing, can never go beyond the power which the bank could legally confer on the officer under the circumstances of which C [the third party] has notice. * * * They only suffice to confer upon the officer just as much authority in the premises as he could have derived from an empowering resolution of the board of directors or of the corporate body." [2]

"The directors of the company then in office were its agents with limited powers, the extent of which the defendant was bound to know." [3]

It is, of course, unnecessary to discuss in a Receiver's action the subject of estoppel by assent of the *stockholders*—a subject foreign to the present discussion.

Second, that a resolution giving a bank officer general power thereafter to issue bank paper for his own

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[1] 1 Morse on Banks and Banking, 3d Ed., p. 212.

[2] 1 Morse on Banks and Banking, 3d Ed., p. 201.

[3] Mr. Justice STRONG in Bedford R. R. Co. v. Bowser, 48 Pa. St., 29, 37; 1 Morse, pp. 260-1.

benefit would be contrary to the policy of the law, and void.

Corporate directors have not unlimited powers. They are in the position of trustees or managing partners,[1] "agents with limited powers."[2]

Thus the directors cannot give the cashier general power to permit overdrafts, even when there is no statutory prohibition of overdrafts, for their powers "are not unlimited, but must receive a rational exposition"[3] "For directors, though they are the government of the corporation, are yet, no less than any subordinate officers, its agents, with a definite scope to their agency, and can only act legally within its scope. If the act is such that it is the duty of the party dealing with them to know that it falls without the ordinary limits of directorial power, he will be affected by its invalidity"[4].

They may make very extensive delegations of power to the officers of the corporation, but they may not make delegations of power which cannot benefit the corporation but only endanger its prosperity, and which are contrary to the policy of the law.

It is against the policy of the law for an officer or agent to make a contract on behalf of the corporation when he is individually interested upon the other side; and it is because it is against public policy that such a contract is voidable[5]. The individual may have

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[1] Koehler *vs.* Black River Co., 2 Black5, 71, 720–1.

[2] Bedford R. R. Co. *vs.* Bowser, 48 Pa. St., 29, 37, STRONG, J.; Hall *vs.* Auburn Turnpike Co., 27 Cal., 255, SAWYER, J.; Jones *vs.* Morrison, 31 Minn., 140; and authorities cited, *infra*.

[3] Minor vs. Merchant's Bank, 1 Pet., 46, 71.

[4] 1 Morse on Banks and Banking, 3d Ed., pp. 260–1.

[5] Warddell vs. Union Pacific R. R. Co., 4 Dill, 330, 335, MILLER, J.; s. c., 103 U. S., 651, 657; West vs. Camden, 135 U. S., 507, 521.

acted honestly, and thought he was acting for the best interests of his company; but the contract will not stand if the company makes timely complaint.

The issuance of a bank draft by a bank officer for his own benefit, is but an instance of this rule. Such a draft, when to his own order or when offered to one knowing of his interest, is a "danger signal," discredited upon its face, because it is against the policy of the law for the officer to act in a double capacity, for his company and for himself[1].

Since the law on grounds of public policy prohibits the acts aforesaid, it necessarily follows that the Board of Directors cannot pass a resolution that thereafter they should be permitted. Directors cannot lawfully enact that the president or cashier may thenceforth contravene public policy. Such a vote would fall "without the ordinary limits of directorial authority." It cannot benefit a bank to give the cashier discretionary power thereafter to issue bank paper for his own benefit. The profit involved in keeping his deposit account could equally well be earned if the discretionary power to issue that particular paper were confided to the president, or some other officer of the bank. Confiding the power to the cashier would, on the other hand, place him in constant temptation, and lead him sometimes into embezzlement.

It may be urged, however, that a draft signed by the cashier to his own order, or for his own benefit, if duly paid for, may be ratified by the board of directors, expressly or by acquiescence. That is true, and for this

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[1] Park Hotel Co. vs. Fourth Natl. Bank, 86 Fed. Rep. at p. 744, and cases cited by SANBORN, J., Lamson vs. Beard, 94 Fed. Rep. at pp. 43-4.

reason: It is not the mere *signature* of the cashier that is objectionable. That is but a ministerial act. It is his exercise of discretionary power in his own behalf which the law makes illegal. If the directors vote that he shall be paid a certain amount of money or given a certain loan of credit, or request him to act in his own name in furtherance of some scheme of the bank, they may instruct him to perform the ministerial act of signing the necessary paper;[1] and so if he issues the paper without authority, but his act was not detrimental to the bank, they may thereafter give a ratification which *priori mandato equiparatur*.

Hence a cashier's draft to his own individual order is not an absolute nullity but only a "danger signal," and may turn out to be upon special authority.

We do not argue that the directors cannot give the president or cashier a *special* authority to sign a particular draft to his own order, but that they cannot give him a *general* authority which will entitle third parties to rely upon his signature without inquiry into the special circumstances of the case.

What inference, then, may properly be drawn by a person aware of the issuance by a bank cashier of a series of bank drafts to pay his individual debts or meet his individual margins? The above argument shows that a general authority to draw bank drafts for these purposes cannot be inferred, because nobody had the power to give him such authority. The inference, therefore, must be either, first, that the directors did not know that he had

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[1] Tripp vs. Swanzey Paper Co., 18 Pick., 291.

been signing drafts for such purposes (which is altogether probable); or that, having been informed of it, they had given him a proper rebuke; or that they had previously authorized, or subsequently ratified, his action in each specific case known to them. None of these inferences would tend to establish a "course of business," justifying reliance upon a future draft of this kind without special inquiry. A draft specially authorized by a board of directors is not given in any ordinary course of business. It is not according to the ordinary course of business for directors to exercise their discretion upon the issuance of a draft. This, under ordinary circumstances, is the function of a cashier, or of whoever exercises the ordinary duties of a cashier; and consultation with the board of directors would be an unusual and extraordinary event.

It is submitted that the great dangers involved in the sustaining of a general authority, such as is here contended for, are too obvious to require extended comment. A sufficient example should be the recent New York case of Hanover Bank *v.* American Dock and Trust Co., *supra*. The defendant's president had signed in his official capacity a warehouse certificate for his own benefit on March 11, 1891. Other similar certificates given to other banks had been held to be nullities, because he was signing for his own benefit.[1] The transaction was sustained, however, and the defendant charged with the loss resulting from this

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[1] Bank of New York *v.* Same, 70 Hun, 152; S. C. on appeal, 143 N. Y., 559; see also Corn Exchange Bank *v.* Same, 149 N. Y., 174; S. C., 163 N. Y., 332.

fraudulent act, because ten years before, when holding a different office in the company, the same officer had issued two similar certificates, while five years before, also while holding a different office, he had signed three other similar certificates, making five in all, and because the company's secretary had stated that he was "the sole man to sign these receipts."

*(g)* The drafts submitted to the jury were not sufficient in number and amount to constitute a "course of business" sufficient to sustain a draft for $7,000.

The Circuit Court of Appeals first held that "nine drafts, five of them to the order of creditors, all amounting to $2,630," and covering a period of about seven months, were not enough, and ordered a new trial.[1] Judge SHIPMAN, who had delivered this opinion, on the second trial held that eight drafts, covering a period of about twenty-four months, and amounting to $594.24, "would have been entirely, in my opinion, inadequate."[2] The case was left to the jury, however, upon these eight drafts, together with four lost drafts, twelve in all, covering the same period, and amounting altogether to $2,076.61.

We have found no instance in the books where a custom of issuing or discounting paper for small amounts has been held sufficient to establish authority to issue or discount to amounts fifty, twenty or ten times—even twice—as large. Pecuniary amount is an element always to be taken into consideration. Thus, in a New York case,[3] the Court says that there is on

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[1] Gale vs. Chase Natl. Bank, 104 Fed. Rep., at p. 218,.

[2] Record, p. 112.

[3] Farmers' Bank vs. Noxon, 45 N. Y., 762, 765; and see Campbell vs. Manufacturers' Bank, herewith submitted; James Reynolds Co. vs. Merchants' Natl. Bank, 55 N. Y. App. Div., at pp. 3, 4.

notice of lack of authority from the discounting of a note by an agent, when he was in the habit of discounting notes "of an amount as large as the one in question."

The test, as stated in Martin *v.* Webb, and repeated by this Court in the case at bar, is that to show a settled course of business the prior acts relied upon must have been performed "during a series of years, or in numerous business transactions." In Martin *v.* Webb the prior deeds of trust relied upon by the Court extended over a period of seven years and were about 150 in number. It is respectfully submitted that twenty-four months is not a sufficient period of time to constitute a "series of years," and thus dispense with the necessity of proving numerous transactions, and that the admitted insufficiency of eight drafts of the total value of $594.24 is not remedied by finding, or inferring the existence of, four more drafts of the respective amounts of $100, $306.67, $306.67 and $769.03.

There must be a pecuniary limit somewhere to be found, a draft below which cannot reasonably and lawfully be used as a precedent for a draft of so large an amount as $7,000. If, during a series of years or in numerous business transactions, an agent should issue drafts to his own order for $6,999 each, they would doubtless be sufficient, so far as amount was concerned, to sustain a subsequent draft of $7,000. If, however, the prior drafts were but for $1 each, to infer from them a power to draw a draft for $7,000 would be absurd. A line must be drawn somewhere. A person to whom a $7,000 draft is tendered with the information that the agent by whom it was drawn has frequently drawn drafts of $1 each, which have been paid

by his principal, must still make further inquiry. It is quite probable that the principal may have given the agent authority to draw for small amounts without special permission in each case, as a matter of convenience. It is very probable that the principal may not have carefully examined the drafts for small amounts, and confined his close supervision to drafts of substantial importance.

It would not be prudent to take an agent's paper, signed in his principal's name for his own benefit, for $7,000 because such paper for $1 or $100 had been honored by the principal; and, as the latest writer says (Huffcut on Agency, § 103): "In any case where the third person may not *prudently* infer that the agent possesses the powers exercised, he is negligent, and it is his own negligence, and not the conduct of the principal, that is the proximate cause of his loss." The third person must act with "average prudence and good faith" *(Id.*, § 102*)*.

In some cases there may be difficulty in drawing the line, but it is submitted that there can be no difficulty in the case at bar.

Defendant urged at the Circuit Court of Appeals that, in addition to the drafts above referred to, a number which were excluded from the jury should be taken into consideration.

These drafts were excluded either because they did not show upon their face that Bush was individually interested in them or because they were in fact used for the benefit of the bank.

It is obvious that for convenience in the transaction of some business for the bank the cashier may draw a draft to his own order. There is nothing wrong

about this. It is not the mere naming himself as payee, but the acting in the bank's name for his individual benefit, that is beyond his authority. Hence, the drafts used for the bank's benefit, whether Bush was named as payee or not, are immaterial to this case.

If, however, the drafts were not drawn to his order, mere inspection would not show that they had been used for his benefit. The Auditing Committee could not learn this without hunting up each draft separately through the individual accounts of depositors, to find where a corresponding amount is charged, or comparing all the drafts with the checks given by depositors therefor. Either would be a gigantic task, and the latter would be impossible of complete performance, since the checks would often be returned to the depositors before the corresponding drafts came back from the New York and Philadelphia banks upon which they had been drawn. Hence these drafts to the order of outside parties, although proved upon the trial to have been obtained for Bush's benefit, were held immaterial. [1]

## V.

*Plaintiff was therefore entitled to recovery in full.*

Upon the trial we tendered to defendant the $15,012.50 check. The tender was made *ex majori cautela*,[2] although believing it unnecessary. It seems

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[1] Gale vs. Chase Natl. Bank, 104 Fed. Rep., at pp. 218–9.

[2] On account of Maguire vs. Halsted, 18 N. Y. App. Div., 228, 230.

to have suggested a point, raised at the Circuit Court of Appeals, that there was a defect in plaintiff's case in not alleging and proving a tender before suit.

Defendant's argument was that a demand was necessary before suit; that a tender of the check was necessary to an effective demand; and that we had therefore failed to prove a necessary condition precedent to the action. To this objection there are two answers:

First. We offered on the trial what the Court considered to be sufficient proof of a demand.[1]

Second. In this case no demand and no tender were necessary at all. It is undoubtedly true that in an ordinary suit for the balance of a deposit account a demand is necessary. Until a demand is made the bank is guilty of no impropriety in retaining the money. This is even the case when the bank has not retained the money, but has paid it out innocently upon a forged check or a forged endorsement.

Demand, however, is altogether unnecessary when the bank has unlawfully claimed an adverse right to the deposit, or has otherwise put itself in the wrong.[2] "If the defendant by his words or conduct denied the right of the depositor, as, for instance, by placing the deposit to the credit of a third person, he thereby became presently liable to an action for the amount, without a formal demand."[3]

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[1] Record, p. 20.

[2] 8 Am. & Eng. Encycl. Law, 2d Ed., p. 839; Bank vs. Benoist, 10 Mo., 519; Miller vs. Western Bank, 172 Penn. St., 197; Howard vs. France, 48 N. Y., 593.

[3] Carroll v. Cone, 40 Barb., 220, 223; affd. by Ct. App., see 41 N. Y. 215, 216; see, also, Korneman vs. Brewing Co., 4 Misc. (N. Y.), 299, 301; Reynolds Elevator Co. vs. Merchants' Natl. Bank, 55 N. Y. App. Div., 1.

This is not in the nature of an ordinary suit for balance of deposit. The admitted balance has been paid, and this suit is to recover an amount to which defendant claims title. Demand was therefore unnecessary, because it was clear that it would be refused. The position taken by defendant was with full knowledge of all the facts of the case. In such circumstances the law does not require so nugatory an act as a demand. "It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary, when it is reasonably certain that the offer will be refused—that payment or performance will not be accepted." [1]

It will be noticed that a tender of the check to defendant was altogether unnecessary for the defendant's protection. The check was not good as against the bank on which it was drawn, but could only have been available in any case as evidence in an action against Bush for its amount; but defendant held Bush's note for the amount, upon which he could have been sued; or, if the bank should prefer to sue him upon this paper, its production could have been obtained by subpœna, if not by a mere request.

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[1] Hills v. National Albany Exchange Bank, 105 U. S., 319, 321; S. P. U. S. v. Lee, 106 U. S., 196, 201-202; Martin vs. Home Bank, 160 N. Y., 190.

## Conclusion.

Most of the specifications of error need no further argument. They raise in different ways the questions hereinabove discussed.

The main objection to evidence (Assignment VII.), and the motion to direct a verdict (Assignment XXVII.), present most of the questions in the case.

The Court's ruling in making the case turn upon the question whether the Elmira Bank's directors had been negligent in auditing vouchers is brought out by Assignments XXXIII., XXXIV., XXXV., LI., LII.

Its ruling that the smallest prior draft that may have been overlooked by the directors supports third parties in giving unlimited credit to a cashier's draft for his own benefit is brought out in Assignments XII., XIII., XIV., LIII.

Assignment XXXI., that it was error to put on the plaintiff the burden of proving bad faith, is supported by Thompson vs. Sioux Falls Bank, 150 U. S., 231, 239; also, see, 123 N. Y., 191, 201; 9 Wend., 170 and cas. cit.; 145 N. Y., 502. The learned Judge probably had in mind cases where negotiable paper comes in due course of business into the hands of a *bona fide* holder for value without notice, and there is no defect apparent on its face.

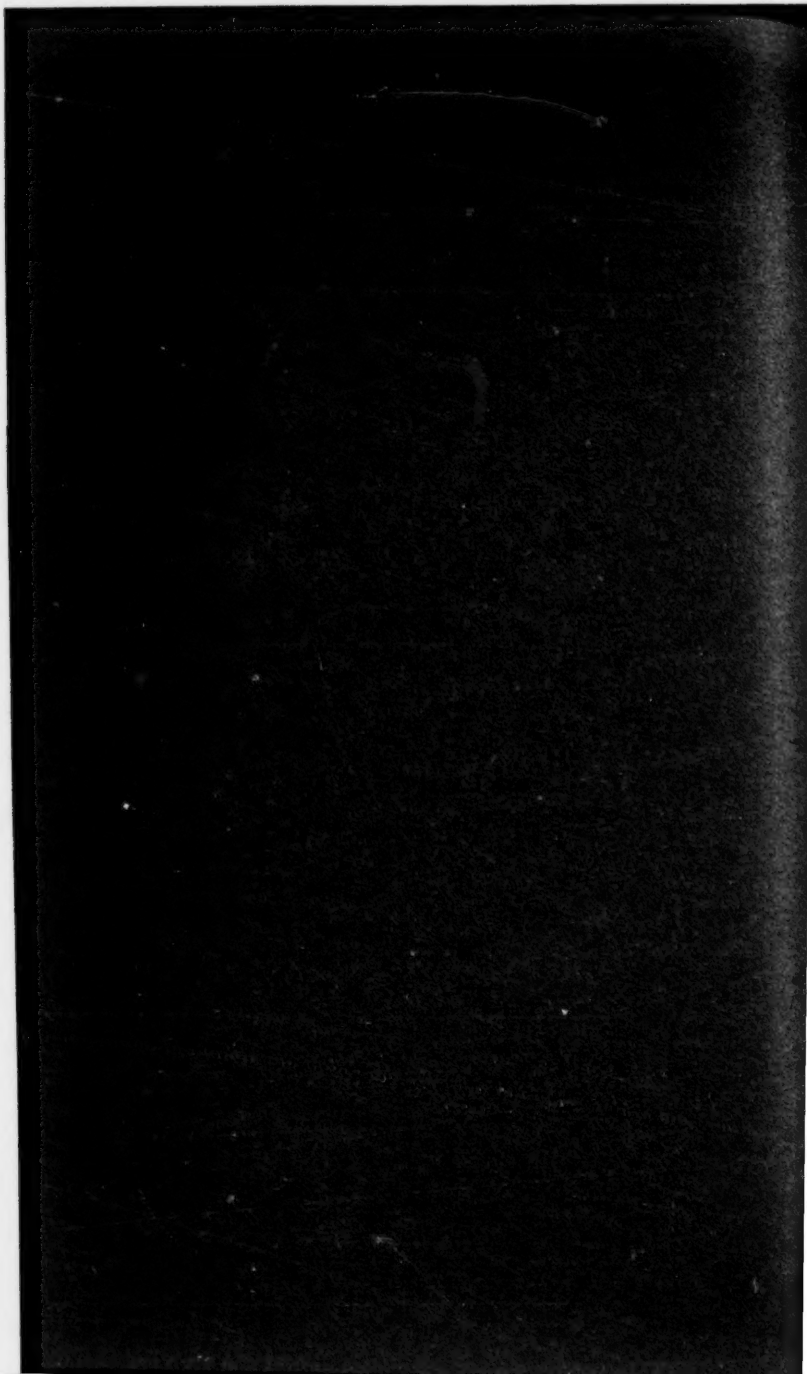
Assignment XLI., that it was error to refuse to charge that the defense fails if Porter's suspicions were aroused, is supported by Goodman vs. Simonds, 20 How., at p. 367 (top.); Murray vs. Lardner, 2 Wall., at pp. 120, 121; Jones vs. Gordon, L. R. 2 App. Cas., at pp. 628-9. The Court had charged that Porter must be affected with bad faith, of which plaintiff had the

burden of proof. He should at least when requested have given the jury the legal definition, and in considering this question the jury should have been apprised of the fact that Porter was conniving at a crime (Assignment XLIV. ; *supra*, p 23.).

The Court had very properly excluded certain drafts drawn by Bush as cashier to the order of third parties (see *supra*, pp. 69–70) ; others of the same kind had been admitted over plaintiff's exception, and it is submitted that plaintiff was entitled to a clear direction that they should be disregarded (Assignment XLVIII.).

For the reasons above stated it is respectfully submitted that the judgment should be reversed.

EDWARD B. WHITNEY,
Of Counsel for Plaintiff in Error.



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# In the Supreme Court of the United States.

OCTOBER TERM, 1902.

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| CHARLES F. GALE, as Receiver, &c., Plaintiff in Error, vs. CHASE NATIONAL BANK. | No. 105. |

## Recent Unreported Cases on "Course of Business."

In the litigations arising out of the embezzlements of Valentine, cashier of the Middlesex Bank of Perth Amboy, N. J., there have been very recent decisions which are of interest as bearing on the question whether, and if so under what circumstances, a prior "course of business," adopted by the cashier, and unknown to the directors and officers of the bank, can debar the bank from denying his authority to issue its drafts for his individual benefit.

The National Broadway Bank case was in October, 1902, before Judge LACOMBE, who had sat in the Court of Appeals at both hearings of the Gale case. It thus expresses his subsequently matured view of the subject, and his reasons for having joined in overruling our contention.

The Manufacturers' National Bank case was decided by the New Jersey Court of Errors and Appeals in March, 1902, some Judges dissenting without opinion.

I beg leave to submit these decisions, together with the opinion of Judge SWAYZE in the New Jersey Supreme Court in the case last referred to.

It should be added that the New York Courts in the same litigation have come to a conclusion which, so far as it is applicable, is adverse to the present contention of the plaintiff in error (Campbell vs. Upton, 66 App. Div., 434; affirmed without opinion in 171 N. Y., 644).

Respectfully submitted,

EDWARD B. WHITNEY,

Of Counsel for Plaintiff in Error.

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## UNITED STATES CIRCUIT COURT,

### SOUTHERN DISTRICT OF NEW YORK.

### CAMPBELL VS. NATIONAL BROADWAY BANK.

OCTOBER 23, 1902.

GEORGE W. WICKERSHAM and SHERRERD DEPUE for plaintiff.

HENRY B. TWOMBLY for defendant.

LACOMBE, J. (charging jury): This action, as you have perceived, is one brought by the Receiver of the Middlesex Bank, of Perth Amboy, to recover from the National Broadway Bank some money which was lost by reason of the transactions which took place between its cashier and the cashier of the National Broadway Bank. The money that it lost was the face of three certain drafts upon the National Park Bank, less certain small sums which it received in exchange therefor.

The transactions between the two cashiers were as follows: Valentine, the cashier of the Middlesex Bank, was indebted to the Broadway Bank on a note

past due and protested, I believe ; at any rate he was being pressed to pay it, and he came to the cashier of that bank and gave him his own, that is, his cashier's draft, on the funds of the Middlesex Bank in its New York depository, the National Broadway Bank, drawing that draft to the order of the Broadway Bank for the amount of his indebtedness to that bank, and turning it over to the cashier of the Broadway Bank in settlement of that indebtedness. That was the character of the first transaction. The third was precisely similar. The second of the three transactions was slightly different, in this: the draft was not given in payment of an existing indebtedness but was drawn to the order of the Broadway Bank and deposited there to the credit of Valentine's firm—Valentine & Company, and upon that deposit the Broadway Bank extended credit to that extent to the firm and the amount was subsequently checked out. So you will see there are three instances in which the Broadway Bank through its cashier received from the cashier of the Middlesex Bank his drafts on the funds of that bank; in two instances for the payment of his individual indebtedness to them, and in the third instance for the receipt of money to be used in his personal transactions, as was manifest from the circumstances that the deposit went to the credit of his firm.

These, as you have seen, were all what is known as cashier's drafts. Of course banks, like everybody else, although they themselves have cash and actual money, also have deposits in other moneyed institutions, and having deposits somebody or other has got to sign orders to get the money out of the depository when it is needed. The cashier is usually the one to draw such drafts, and the one to sign them ; but no cashier of any bank, by reason of the circumstances that he is the cashier, derives therefrom any authority to use the funds of the bank as his own, to pay his own debts with, or to draw off and invest in his own personal enterprises; and any one to whom a draft of that character is presented, that is,

a draft by the cashier of a bank upon the bank's funds, drawn to his own order, or to the order of his personal creditor, the creditor at the time having no transactions pending with the bank of which the other man is cashier, it is notification at once that there is something suspicious, something improper, something crooked to be anticipated. Everybody is naturally charged with knowledge upon receiving such a draft as that that there is risk to ensue from the payment. The risk originally, under the authorities—the natural risk to be anticipated—was that if it should turn out that by reason of improper conduct on the part of the cashier of the bank, the bank lost some of its funds through this transaction, then the creditor who had taken this cashier's draft would be liable to refund to the bank, or to its Receiver, on demand, the money obtained by means of such draft or check, because he was advised that it was an improper one and he took his risk. *It would have been a most wholesome thing if that principle had never been qualified at all* and if nobody was authorized under any circumstances to receive the drafts of the cashier of a bank on the funds of the bank in payment of the cashier's individual debt to the individual receiving them; but there have been occasionally very hard cases arising and hard cases have their operation in qualifying what may sometimes seem to be a very harsh rule of law, and it has seemed to the courts that as between two parties who are equally innocent in the matter, that is to say, on one side the stockholders and creditors of the bank, and on the other side the creditor who took the draft and gave up money for it, as one or the other must lose the money, it had better be the one whose officers were dishonest and whose directors were negligent, rather than the other one. That is quite a familiar principle, although in this particular instance the courts seem rather to have overlooked the circumstance *that in the one case the unfortunate stockholders and creditors had no means of knowing that their officers were dishonest or their directors negligent, until*

*the trouble had occurred; whereas the creditor who received the consideration would always be advised by mere inspection of the face of the draft that something crooked was to be anticipated, that something was not right.* However, pass all that. We have no concern with it, because the rule is laid down and laid down abundantly by the authorities that the risk taken is not the risk of having to make good the bank's loss by the transaction, but only the risk of being able to show that the particular paper, which ordinarily on its face might seem tainted challenged attention and suspicion, was still, by reason of the way in which the business of the particular bank had been done, a draft of the sort that was drawn, in the regular course of business and therefore he might be entitled to take it. In other words, when it appears in proof that during a series of years, and in numerous business transactions, the cashier has without objection and in his official capacity pursued a particular course of conduct,[1] it is to be presumed that that, so far as his bank is concerned, is a proper enough course of conduct. The conclusion resulting from that has been put by different authorities on different grounds. *It seems to me that the soundest ground to put it on is one which deals with the form of the draft, and not with any implied authority.*[2] *The Board of Directors themselves could not have given authority to the cashier to use the bank's funds as his own.* Suppose we had here a resolution of the Board of Directors to this effect: "Whenever the cashier is without money and is harassed by his creditors and wants to pay them, or whenever he needs money for his personal speculation, he is hereby authorized to take any money of the bank that he is able to lay his hands on, to use it to pay his debts with or to buy what he wants." That resolution, if

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[1] [From Martin v. Webb, 110 U. S. 7, as quoted in Gale v. Chase National Bank, 104 Fed. Rep., 214.]

[2] [This is a change in theory from the Gale opinion at p. 216.]

passed by the directors at a meeting, would be no protection to the cashier as between himself and the bank claiming to get back any money which he might have misappropriated; and if when this check was presented to a creditor of the cashier, at the same time there was presented a copy of such resolution of the bank, I doubt very much whether any court could be found to say that a creditor who took the draft under those circumstances, not only improper in its form but coupled with this resolution of the Board of Directors undertaking to give an authority which showed that there was a dishonest combination in the bank—I do not believe any court would hold that he was entitled to retain the proceeds of that draft as against the claims of creditors or stockholders of the bank.

So it seems to me that *the more logical ground upon which to put this continued course of official conduct, as relieving the party taking the note from the risk of responding*, is this. What challenges attention is the fact that this draft on the bank funds is drawn either to the order of the cashier himself or is drawn to the order of the cashier's personal creditor, for the amount of his personal debt. But if it appears that that was the way in which repeatedly, for a long series of years, drafts of this bank were drawn, then that particular notice ceases to have the weight which it otherwise would have, and the attention of the person receiving the draft is no longer so peremptorily challenged to the impropriety in its form as to hold him responsible for the consequences of taking it.[1] With that point in view it will be for you to consider the effect of the testimony in this case. The question which you will have to determine is whether, during a series of years sufficiently long, and in business transactions sufficiently numerous, cashier's checks of this bank had been going out payable to his own order or payable to the order of his

[1] [Why not, if he did not know of the previous drafts?]

individual creditors to pay his individual debts. If you are satisfied that such transactions had continued for a sufficient length of time, and had been sufficiently numerous to make out a regular course of business in the conduct of the bank, then your verdict will be for the defendant. If, on the contrary, you reach the conclusion that these are but few in number and are scattered over such a period of time that they do not suffice in themselves to make out a regular course of business of the bank, then your verdict will be for the plaintiff.

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## COURT OF ERRORS AND APPEALS OF NEW JERSEY.

CAMPBELL

vs.

MANUFACTURERS NATIONAL BANK.

MARCH, 1902.

On error to the Supreme Court (SWAYZE, J.).

JOSEPH COULT, FRANCIS CHILD and JOHN A. MILLER, for Plaintiff in Error.

RICHARD V. LINDABURY and SHERRERD DEPUE, for Defendant in Error.

FORT, J., delivering the opinion of the Court :

This is an action by the Receiver of the Middlesex County Bank to recover back, money paid to the plaintiff in error, by George M. Valentine, who was at the time of the payment, cashier of said Bank. The payment was made by Valentine in satisfaction of his individual debt. The method of payment was by a

draft of the Middlesex County Bank, drawn on The National Park Bank of New York, its correspondent, and signed "George M. Valentine, Cashier." The draft thus issued, was drawn to the order of John A. Miller, Attorney, and delivered to him, for the plaintiff in error.

The transaction out of which the indebtedness of Valentine to the plaintiff in error, The Manufacturers National Bank, arose, was the discounting of a note, made by a firm of which Valentine was a member, and endorsed by Valentine, individually, and others. This note, thus discounted, fell due and was protested, and afterward judgment was obtained thereon against the makers thereof, and Valentine individually.

The Middlesex County Bank had no interest, directly or indirectly, in the note or its proceeds.

All these facts were known to the plaintiff in error, both before and after the judgment.

The judgement was entered March 4, 1899.

Mr. Miller, the Attorney of the Plaintiff in Error, after several attempts, found Valentine at the Bank in Perth Amboy, on March 13, 1899. Payment of the judgment was demanded and after some talk, Valentine, in the presence of Miller, took the draft book of the Middlesex County Bank containing blank drafts of that bank on the National Park Bank of New York, and filled out a draft of the Middlesex County Bank upon the National Park Bank of New York, for the sum of Seven thousand and five hundred dollars to the order of J. A. Miller, Attorney as aforesaid, and signed it "Geo. M. Valentine, Cashier" and handed this draft to Miller.

The draft thus delivered to Miller was not, and did not pretend to be, anything other than the drafts of the Middlesex County Bank, made by its Cashier in his official capacity against the funds of the Middlesex County Bank deposited in The National Park Bank of New York, and was intended by Valentine and known by Miller to be issued for the payment of the debt of Geo. M.

Valentine as an individual. With all these facts the Plaintiff in Error, by its officers and its attorney, was familiar.

*There is no reason which is founded on principle that can be given for not applying the same rule of agency to a cashier as to or other persons occupying fiduciary relations.* No person can act as an agent in a transaction in which he has an interest, or to which he is a party, on the side opposite to his principal. This must be so where the person dealing with the agent has knowledge of the facts.

A person cannot deal with the cashier of a bank as an individual in securing a draft and claim after the draft is delivered it has become the transaction of the bank ; to make the acts of the cashier valid, the transaction in which the draft is delivered must be a bank transaction made by the Cashier, within his express or implied authority, in the conduct of the business of the bank. So long as a person deals with the Cashier in a matter wherein, as between himself and the Cashier, he is dealing with or has a right to believe he is dealing with the bank, the transaction is obligatory upon the bank.

The Cashier is presumed to have all the authority he exercises in dealing with executive functions legally within the powers of the bank itself, *or which are usually or customarily done, or held out to be done, by such an officer.*

*But the test of the transaction is whether it is with the bank and its business or with the Cashier personally and in his business.*

Claflin vs. Farmers Bank, 25 N. Y. 293.
Moores vs. Citizen National Bank, 111 U. S., 164.

As to the former, all presumptions are in favor of its regularity and binding force. In the latter no such presumption arises, in fact, upon proof that it was known to the claimant to be an individual transaction, and not one for the bank *the burden is cast upon*

*the claimant to establish by proof that the act of the Cashier thus done, for his own individual benefit, was authorized and ratified.*

These are fundamental principles applicable to principal and agent in every transaction arising out of that relation.

A. D. & T. Co., 143 N. Y. 559 (564).
M. L. Ins. Co. vs. F. S. S. & G. &c. 139 N. Y. 146 (151).
Shaw vs. Spencer, 100 Mass. 382 (390) (394).
Petrie vs. Clark, 11 S. & R. 377 (Gibson C. J.).
Rochester & C. T. R. Co. vs. Paviour, 164 N. Y., 281 (286).
Huffcut on Agency, (2nd Ed.) p. 110.

Little contention was made in this case, even by the Counsel for the plaintiff in error, against the rule above stated, although some effort was made to distinguish between the rule applicable to principal and agent as applied to a Cashier, as contradistinguished from other agency relations, but we are unable to accept such a theory or to hold the rule to be any broader in the case of a Cashier, than as above declared.

Strong contention was made by the plaintiff in error for the right to retain the fund received for Valentine's individual debt, from the proceeds of the draft of the Middlesex County Bank, upon the grounds, (1) that Valentine was authorized to issue such drafts, and (2) that if he were not so authorized his act in this case would be deemed ratified, through the knowledge of the bank's officers obtainable from the draft itself or the records of the bank, from which they actually knew, or were chargeable, in the exercise of ordinary care, with knowing the transaction.

The case is utterly devoid of proof that Valentine was ever authorized by any one to draw drafts of this character for his individual account against the funds of the bank with its New York correspondent. It does appear that he had overdrawn his account and bor-

rowed money on questionable securities, but those transactions are stated by the letters to the banking department to be ones with which the directors were familiar and about which the directors knew and for which they held securities and in which the directors only differed with the banking department as to the sufficiency of the security they had required Valentine to pledge for those loans.

There is no proof that those loans were not made in the usual course; nor that the directors authorized or acquiesced in the use of the bank's funds by Valentine before, or without, their knowledge; nor that Valentine, in any of the transactions out of which these obligations arose, had ever dealt with any person to create his indebtedness to the bank before the bank directors knew of it and had authorized his use of the funds; nor is there anything to show, in any of those letters to the banking department by the President of the Bank, or from that department to the bank, *that the directors knew he was using the funds of the bank, without their knowledge or consent, in his individual transactions* or that he had paid a single individual debt before they were advised of it and had received security from him for the money which he proposed to use to pay it. It would have been an entirely different situation if he had been in the habit of drawing similar drafts against the bank's funds for his individual purposes before consulting the President or the Directors *and they had known of, or subsequently approved, such acts.* That would have been a case within the principle ruled in Goshen Bank vs. The State of New York, hereinafter considered, but that is not this case. Whatever acts are proven to have been done by Valentine, without the approval of the President or Directors first obtained, were admittedly concealed transactions—not open ones—fraudulent acts. It is not pretended that a single one of the thirteen drafts alleged to be fraudulent out of over 16000 honest ones, was actually authorized or ratified by the President or the directors; nor is it pretended that a single open

transaction of that kind was known to or ratified by them.

It is not concealed dishonest transactions which made a ratification but open ones of a character similar to the alleged dishonest ones.

Gale vs. Chase National Bank, 104 Fed. Rep. 214.

If a Bank gives its cashier authority to draw drafts for his own account on its funds or ratifies its acts in *known* transactions which he openly conducts, honestly or dishonestly, it will not be permitted to say that a similar transaction which he secretly and by concealment conducts does not bind it. The distinction is just there. This was the basis of the decision of the New York Court of Appeals, in the Goshen National Bank vs. The State of N. Y., 141 N. Y., 379, upon which the plaintiff in error so strenuously relies. The opinion in that case cites the facts very meagrely. Through the courtesy of the present Chief Judge of that Court, I have had before me all the proofs, findings and exhibits, upon which that case was decided, and an examination of the record fully sustains Judge PECKHAM in saying that the cashier there "had the right to draw a draft on the corresponding bank of the claimant, for himself, upon the same terms that he had to draw a draft for a stranger." Henry Bacon, the President, testified at page 9 of the record, that "He (the cashier), had a right to draw a draft on the Importers and Traders National Bank for himself on the same terms that he would draw for a stranger." George Grier, the Assistant Cashier of the bank, testified, that he was well acquainted with the Cashier's methods of drawing drafts in all his transactions as County Treasurer, for more than a year prior to the drawing of the fraudulent draft in controversy, and that during that period Murray "was accustomed to draw checks as County Treasurer against the funds in his hands as such Treasurer on deposit in the Goshen National Bank, payable to the Goshen

National Bank, in various amounts and then as as Cashier of said Goshen National Bank, to draw drafts for a similar amount on the Importers and Traders National Bank of the City of New York, against the funds of the Goshen National Bank on deposit with said Importers and Traders National Bank, placing said drafts to his credit in said Importers and Traders National Bank as County Treasurer."

There was no dispute under the facts in that case that practically all the time that Murray, the Cashier, was County Treasurer, he had used the Bank's drafts for his own purposes, as such Treasurer, to transfer funds to New York with the knowledge of the President, Assistant Cashier and directors. He was also permitted to draw such drafts to himself as a stranger, in County Treasurer matters, with the same freedom that he would issue such a draft to any customer of the bank. They had allowed him to treat himself in his official relations of County Treasurer, in the matters of issuing cashier's checks or drafts, for County Treasurer's account, as he was permitted to do for any other depositor or other person dealing with the bank in the ordinary course of business.

That case was upon its facts in exact conformity with the principle here sustained and upon all the cases, under the facts proven, was rightly decided. Judge PECKHAM himself, expressly distinguished the Goshen Bank case, from cases like the one before us, in Bank of New York vs. American Book & Trust Co., 143 N. Y., 559 (564).

Nor will the facts in this case justify a finding of constructive notice to the directors of the Middlesex County Bank arising from a failure to know what they would have known, had they exercised ordinary care, *as to the draft issued by Valentine to Miller.* If the draft had been drawn to Valentine's own order, it would have been discoverable upon inspection and some question might then have arisen. This draft was drawn to "John A. Miller, Attorney" and was regularly entered on the stub of the draft book, and would appear

perfectly regular in the account current when returned by the National Park Bank with the vouchers at the end of the month. A bank may issue its draft to any one who pays for it. It is to be [?] said that a bank will be held to ratify a draft, fraudulently issued by its Cashier, though regular on its face, because the other officers of the bank do not trace through the books of the bank to see to what account it is charged. Upon the face of the draft no one but Miller the Attorney, and the officers of the plaintiff in error, beside Valentine, could have known the draft was for his individual debt.

That which is discernible by inspection, upon the face of the draft or record, and which needs no investigation to show it to be out of the ordinary and therefore speaks for itself, will no doubt, raise an implied or constructive ratification, if seen by officers or directors. And, failure to exercise ordinary care in checking off vouchers or inspecting records by bank officials will, no doubt, also raise such a ratification, if it appears that if they had so examined the same, a simple inspection thereof, would have shown the facts.

They are undoubtedly chargeable with the things they know or would have known by the exercise of ordinary care and are estopped from denying the responsibility thereon unless repudiated within a reasonable time after such knowledge or imputed knowledge. But the facts in this case as to the draft in question do not bring it within this rule.

All the points here determined are fully discussed by the opinion in Lamson *et als.* vs. Beard, decided in the United States Circuit Court of Appeals and the same conclusion reached as here.

Lamson vs. Beard, 97 Fed. Rep., 30.

Under all the cases and upon principle, under the facts in evidence, the trial court was right in directing a verdict for the plaintiff and the judgment of the Supreme Court entered on that verdict is affirmed.

GARRISON, J. (concurring) :

*I have not been able to see how one agent of a bank could confer general authority upon another agent of the bank to transfer the property or credits of the bank to the latter's individual creditors in payment of his personal debts.*

*If express authority to this effect had been shown it would not in my judgment have altered the case.* Hence of course I do not consider that it was error to refuse to permit the jury to determine whether or not there was implied authority to the same end. For this reason I shall vote to affirm the judgment of the trial Court. I concur wtth the view of Mr. Justice FORT that there was no proof of ratification of this particular transaction.

DIXON, J. (dissenting) :

I think that a bank cashier may be authorized by the board of directors to use the funds of the bank for his private business; and that the terms on which such authority may be given are within the absolute control of the board; to this extent that, when in pursuance of the authority the funds have been paid to a third party in payment of a debt, the fact that such party had notice that they were the bank's funds is not sufficient to warrant the bank in reclaiming them. Nor will the completed transaction be rendered voidable by the further fact, that the terms on which the authority was given are such as to charge the concurring directors with indiscretion or fraud.

It is conceded in this case that the defendant and its agent Mr. Miller had no notice of any suspicious circumstances other than the cashier was using the bank's funds to pay his private debt. This notice devolved on the defendant the burden of showing that such use was authorized by the board of directors.

But I dissent from the present judgment on this ground, that in my opinion the evidence produced at the trial made it a question for the jury, whether the

act of the cashier was within the authority conferred upon him by the board, and therefore the direction of a verdict for the plaintiff was wrong.

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## NEW JERSEY SUPREME COURT,

### February, 1901.

### Campbell vs. Manufacturers' National Bank.

Swayze, J. (on motion to direct a verdict, being the decision reviewed in the foregoing opinions): If counsel have nothing further to say, I will decide this motion at once. The conclusion that I have come to in the case is such that it may be well to state at some length the facts as I understand them, and the reasons for the conclusion I have reached at somewhat greater length than I usually would.

Shortly before March 13, 1899, the Manufacturers' National Bank of Newark had recovered a judgment for about $7,700 (I have forgotten the exact amount) against George M. Valentine and another upon a promissory note endorsed by them. John A. Miller was the attorney of the bank in the suit which resulted in this judgment. George M. Valentine was then, and for several years had been, cashier of the Middlesex County Bank, a State institution at Perth Amboy. On that day Judge Miller saw Valentine at the bank in Perth Amboy and received from him in satisfaction of his liability upon the judgment about $200 in cash and a draft of the Middlesex County Bank upon the National Park Bank, its reserve agent in New York City, for $7,500. This draft was in the ordinary form, payable to the order of John A. Miller, attorney, and signed by George M. Valentine as cashier of the Middlesex County Bank. Judge Miller at once had it certified by the Park Bank, endorsed it "John

A. Miller, attorney," and then "John A. Miller," and deposited it to his own account in the Manufacturers' National Bank, which forwarded it for collection to New York. At the same time or soon after, Miller settled with the Manufacturers' Bank for the amount he had thus collected, by his individual check for a considerably larger amount, including in the check some other items. The draft of the Middlesex County Bank was paid in due course of business by the Park Bank and returned, with other vouchers and the regular monthly statement, to the Middlesex County Bank on or about April 1, 1899.

In July, 1899, the Middlesex County Bank failed. It was then discovered that Valentine had misappropriated the funds of the bank to a very large amount, chiefly by means of drafts on the Park Bank, used by him for his individual purposes.

Edward S. Campbell, the present plaintiff, was appointed receiver of the Middlesex County Bank, and, some time in 1900, began this suit to recover back the amount paid by Valentine to Miller. The plaintiff, at the close of the case, abandoned his claim to recover the *cash* paid to Miller, and limited his claim to the amount of the draft and interest.

The theory upon which the plaintiff seeks to recover is that the defendant is chargeable with knowledge that Valentine used the money of the bank to pay his individual debt, and that, having wrongfully received the bank's money, it must now make restitution. The plaintiff's case rests upon the legal principle that no person can act as agent in regard to a contract in which he has any interest, or to which he is a party, on the side opposite to his principal. This doctrine is so well settled in its application to this class of cases that it is unnecessary to do more than refer to the cases cited at the argument.

*Claflin* v. *Farmers' and Citizens' Bank* (1862), 25 N. Y., 293.

*Anderson* v. *Kissam* (1888), 35 Fed. Rep., 699.

*Goshen National Bank* v. *State of New York* (1894), 141 N. Y., 379; 36 N. E., 316.
*Bank of New York National Banking Association* v. *American Dock & Trust Company* (1894), 143 N. Y., 559; 38 N. E., 713.
*Hanover National Bank* v. *American Dock & Trust Company* (1896), 148 N. Y., 612; 43 N. E. 72.
*Corn Exchange Bank* v. *American Dock & Trust Company* (1896), 149 N. Y., 174; 43 N. E., 915.
*Lamson* v. *Beard* (1899), 94 Fed. Rep., 30.
*Gale* v. *Chase National Bank* (1900), 104 Fed. Rep., 214.

This general principle is not disputed by the defendant. It is insisted that it is inapplicable to the present case for several reasons:

1. Because the draft was to the order of Miller instead of to the order of the bank; was taken by him without the knowledge or authority of the defendant bank; was mingled with other funds, and so paid to the Manufacturers' Bank.

2. Because it is said Valentine was authorized by his own bank to draw drafts to his own order, and the defendant had the right to rely on that authority.

3. Because the Middlesex County Bank failed to call the attention of the Manufacturers' Bank to Valentine's alleged want of authority, although it had the cancelled draft in its possession and a monthly statement of the Park Bank showing payment of the draft as early as April 1, 1899.

As to the first ground of defense—that the Manufacturers' Bank cannot be held by reason of Miller's acceptance of the draft—I think it quite enough to say that Miller was acting at the time as the bank's agent, about the bank's business, and that the bank was responsible for his acts and chargeable with notice of any infirmity in this draft to the same extent as Miller

himself. The Manufacturers' Bank was the principal, and Miller merely its attorney.

The question of the cashier's authority is the serious and difficult question in the case, and the question to which the evidence has been chiefly directed. The cashier of a bank is the general executive officer of the bank and transacts its business under the orders and supervision of the Board of Directors. His power as cashier, by virtue of his office alone, is greater than the power of any other officer of a corporation. As cashier, he has authority, by virtue of his office alone, to draw drafts upon the bank's deposits in another bank; but this power does not extend so far as to authorize him to draw drafts to his own order for his own use. This is forbidden by the principle of law already referred to,—that no person can act as agent in regard to a contract in which he has any interest, or to which he is a party on the side opposite to his principal. The fact that a bank draft is commercial paper does not avail in favor of a creditor of the cashier who takes the cashier's draft on his bank's account in satisfaction of a private debt of the cashier. The reason is that the creditor who takes such a draft necessarily has notice, from the face of the draft itself, that he is being paid with the bank's money. He is in no better position than if he stood by and saw the cashier take the money out of the bank's till. On the face of things, the money belongs to the bank; nothing can overcome this fact, which is apparent on the face of the draft, unless the cashier has had authority to draw drafts to his own order conferred upon him in some way by the directors. If the cashier had had such authority conferred upon him, a draft to his own order is like a draft to the order of any one else, and is binding upon the bank. The presumption is that the money is the bank's money; it is for the person dealing with the cashier to establish the contrary by proof. The burden is upon the person dealing with the cashier in his own matters to inquire

as to the cashier's authority. He cannot rely merely upon the fact that the person signing the draft is cashier. The case differs from cases where the bank is held bound by the cashier's representations; the bank is only held to be bound by such representation when the bank has given him the authority to act and thereby put it in his power to misrepresent. When, as in this case, one deals with an agent who is apparently without authority, he is bound to inquire into the agent's authority to represent the principal. In the ordinary case of a bank draft to the order of a third party, the fact that it is signed by the cashier is enough; the authority to draw such a draft inheres in the office. In the case of a draft by the cashier to his own order, to pay an individual obligation, the person taking it is bound to inquire into the cashier's special authority to issue such a draft. If he fails to inquire, he takes the draft at his peril. This rule, which manifestly tends to secure honesty, and to protect banking institutions against the misconduct of their officers, is thoroughly sustained by the authorities above cited. The case of the *Goshen National Bank* v. *State* (1) was relied upon as establishing a contrary view. Undoubtedly the language of Judge PECKHAM does sustain the defendant's view; but the language of the opinion was unnecessarily broad, for the fact was that the debt paid by the draft in that case was not the individual debt of the cashier, but was a debt of Orange County to the State of New York for taxes held by the cashier as county treasurer; and the further fact appeared, as stated in the opinion, that Murray, the cashier, had the right to draw drafts for himself upon the same terms that he would have had in the case of a third party.

The Goshen National Bank case was decided February 27, 1894. On November 27, 1894, the same court, in an opinion also by Judge PECKHAM, decided the

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(1) 141 N. Y. 379; 36 N. E. 316.

case of *Bank of New York National Banking Association* v. *American Dock & Trust Company*, (1) and distinguished the Goshen National Bank case upon the ground lastly stated above. I am referred to *Morse on Banking*, sec. 165. In par. *(b)* the author says that "if the act which the cashier assumes to perform is one intrinsically proper to be committed to his charge, the law will presume in favor of a third party dealing with him that he was duly authorized to perform it." But a reading of the whole section shows that this presumption is only made in favor of an innocent party; and, for the reason already stated, a creditor of the cashier taking the bank draft signed by the cashier in payment of an individual debt, is not an innocent party; he is chargeable with notice of the infirmity of the draft.

The question to be decided, therefore, in this case is whether Valentine had authority to sign draft to his own order. If he had such authority, the plaintiff must fail. If he had no such authority, the plaintiff must prevail, unless some other defense is made out.

It is, of course, true, as Morse says in the section already cited, that this authority may be conferred not only by resolution of the Board of Directors but by verbal direction, by usage and by tacit approval. A careful statement of the general principle is to be found in *Morawetz on Corporations*, sec. 509, and in an opinion by Justice HARLAN in *Mining Company* v. *Anglo-Californian Bank* (1881), 104 U. S., 192.

The principle is stated with even greater accuracy by Justice DEPUE in the case of the *Fifth Ward Savings Bank* v. *First National Bank of Jersey City*, 19 Vr., 527, as follows:

"There are cases in which the powers of an officer of a corporation and his authority to act for the company are enlarged beyond those powers which are in-

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(1) 143 N. Y. 559; 38 N. E. 713.

herent in his office. But those are cases in which the agency of the officer has arisen from the assent of the directors, presumed from their consent and acquiescence in permitting the officer to assume the direction and control of the business of the company. Thus, when, in the usual course of the business of a corporation, an officer has been allowed to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. These are simply instances of the application of the principle that usual employment is evidence of the powers of an agent, and a responsibility will be laid upon the principal for the acts of his agent within the apparent authority so conferred upon the agent—a doctrine which has come to be applied to corporations in many respects as well as to individuals, and with the same qualifications and limitations. In such cases the authority of the officer does not depend so much on his title, or on the theoretical nature of his office, as on the duties he is in the habit of performing."

In the present case there is no proof of any express authority, either verbal or by formal resolution, to the cashier to draw drafts to his own order. There is proof that from September 12, 1894, to March 13, 1899, he drew fourteen drafts which appeared on the stubs of the draft books to be drawn to his own order; that from December 20, 1893, to March 13, 1899, he had drawn eight other drafts, which appeared by the stubs to be drawn to the order of third persons, but which were actually used by Valentine for his own purposes. In most cases the stub was for a small amount, the draft for a large amount. In all but five cases the amount as it appeared on the stubs was correctly carried through the books of the bank, and these books, aside from the stubs of the draft books, regularly balanced. The five drafts which were never carried from the stubs through the books were omitted by the direction of Valentine, who told the clerks that he would make the entries himself. An examination

of the stubs of the draft books would have disclosed the omitted drafts and would have disclosed that the fourteen drafts had been drawn to Valentine's own order. A comparison of the monthly statement of the Park Bank with the books of the Middlesex County Bank, or a comparison of the vouchers returned by the Park Bank with the stubs of the draft books would have disclosed the frauds. Inquiry by the president or directors of the Park Bank as to the balance of the account would have disclosed at once the large discrepancy between the balance on the books of the Park Bank and the balance as shown by the daily statement of the Middesex County Bank. Notwithstanding these facts neither the directors nor the State Banking Departments discovered the frauds until the failure of the bank. It is true that the Banking Department, as early as November 18, 1895, called the attention of the president to a large overdraft by Valentine and to loans to him insufficiently secured, and apparently for speculative purposes, and subsequently called the president's attention to a false report made by him and Valentine. The loans and overdrafts seem to have been adjusted, and no further action was taken upon the false report. A portion of the letter of November 18, 1895, from the Banking Department to the president was read by Valentine at a meeting of the Board of Directors, but all the directors who were present testify that the portion relating to his own loan and overdraft was not read. At any rate, no suspicion was aroused and no examination or investigation made by the directors, who say that they relied entirely on the examinations made by the Banking Department. Under this state of facts the defendant insists that the directors must be assumed to know what would have been disclosed by an examination of their own books. Such an examination would have disclosed that Valentine was drawing drafts to his own order and for his own purposes. The inference is that they acquiesced in this course of business and thereby gave him an implied authority to

draw drafts to his own order and for his own purposes; and the argument is that the authority once having been vested in Valentine was available to all persons dealing with him. On the other side it is said that an examination of the stubs would have disclosed only the fourteen drafts to Valentine's own order, and that, for aught that appeared upon the stubs of the bank books, the drafts to Valentine's order might have been signed by the president; that such would be the presumption upon the principle *omina presumuntur rite acta.*

The question in the case is narrowed, then, to the question whether an implied authority arises out of the number of transactions proved in this case, which were not known to the directors, but which they would have known if they had not been negligent.

The liability of the Middlesex County Bank for the act of its cashier does not, I think, depend upon the principles of the law of negligence; one reason is that the Manufacturers' Bank is not, in this case, an innocent party—that is, a party not chargeable in law with notice of the cashier's fraud; another reason is that the Manufacturers' Bank was itself negligent in failing to enquire into the cashier's authority. On this point I think the law is well stated by Judge COOLEY in the case to which I was referred.

*New York Iron Mine v. Negaunee Bank* (1878), 39 Michigan, 644.

At page 656 he says: "But before the maxim which the plaintiff invokes can be applied to the case, it is necessary to determine not only that fault as imputable to the defendant, but also that the plaintiff is free from negligence. There must be one innocent party and one negligent party before the requirements of the maxim are answered; and the conduct of the plaintiff is therefore as important as that of the defendant. Was the plaintiff in this case free from negligence in discounting the three $5,000 notes? In law the officers of the

bank must be held to have known that Mr. Wetmore had no right to make such paper without express authority, and we look in vain for any evidence that they demanded proof of such authority, or extended their inquiries beyond the agent himself. Moreover, there was that on the face of the notes to suggest special caution ; they were made by Mr. Wetmore in one capacity to himself and his associate in another capacity, and they indicated, or at least suggested, an interest on his part in making them which was adverse to the interest of his principal."

I think, therefore, that the question of the negligence of the directors is not the crucial point in the case. An authority may be implied from a course of business without any negligence on the part of the directors. It is implied if the directors know of the course of business and allow it to go on without objection ; and it has been held in the United States Supreme Court and in the New York Court of Appeals that it may be implied if they allow it to go on without objection when they ought to know it. The assent of the directors is implied, either from their actual knowledge or from a presumption of knowledge arising out of the facts of the case. A reading of the cases already cited has led me to the conclusion that the ground upon which they go is that the knowledge of the directors is presumed from the number of the transactions and their publicity, and that the cases do not go upon the ground that the directors were negligent in failing to discover the transactions. Thus, in *Martin* v. *Webb*, (1) the transactions covered a series of years, were legal transactions right in themselves, included the cancellation of numerous mortgages, and must have been of a public character, appearing in the county records ; the business of the bank was of such a kind that the directors must have known that somebody had to act for the bank in the

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(1) 110 U. S. 7.

cancellation of the mortgages, and must have known that there was nobody but the cashier to act. In such circumstances it would be manifestly unjust to allow the directors to say they did not know what the cashier had openly and frequently done; the law presumes that they knew.

In the Hanover National Bank case, (1) the opinion expressly says that Stone had *openly* assumed to issue certificates for himself for deposits of cotton.

In *Auten* v. *United States National Bank*, (174 U. S., 125), the directors knew that the bank's paper was rediscounting in large amounts, and that money was borrowing continually; they must have known that the paper was being endorsed by some one for the bank.

In *Blake* v. *Domestic Sewing Machine Company*, (38 Atlantic, 241) the notes were so numerous, the transactions were so frequent and continued for such a length of time, that a course of business had been clearly established, which it was perfectly fair to presume the directors knew. In none of these cases was there negligence on the part of the person dealing with the officer of the corporation. In all of these cases the transactions which it was held constituted a course of business, knowledge of which was imputed to the directors, were, in themselves, fair transactions. In my judgment, the basis of the rule is accurately stated in the case of the *Fifth Ward Savings Bank* v. *First National Bank*, (2) above cited; and I think the expressions in *Martin* v. *Webb* and in the *Hanover National Bank* case, so far as they seek to extend the rule by inferring an authority from transactions which the directors "ought to know" as distinguished from transactions which they are "presumed to know," state the rule too broadly—more broadly than the facts of those cases required. The real question is not whether the directors were negligent, but whether such a course

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(1) 148 N. Y. 612; 43 N. E. 72.
(2) 19 Vroom, 518.

of business has been established that acquiescence of the directors is a necessary conclusion.

If the number of instances, then, in which Valentine signed drafts for himself is so great that an inference may fairly be drawn that the directors must be presumed to have known of the course of business, authority to draw drafts to his own order must be implied, and the plaintiff in this suit must fail. It is obvious that it is impossible to fix a hard and fast rule as to the number of instances which are necessary to establish a course of business; and, in a case of doubt, I ought to leave it to a jury to say. In *Gale* v. *Chase National Bank*, (1) nine instances in a few months were held insufficient and the judgment was reversed because the judge had left the question to the jury instead of directing a verdict for the plaintiff. Whether the number of instances in which Valentine drew drafts for himself would, if the transactions were fair in other respects, suffice, I do not pretend to decide. I do not think it is the number of instances in which it is exercised that determines the cashier's authority. The question is whether, under all the circumstances of the case, the authority has been exercised so often and in such a way that the assent of the directors must be assumed. The circumstances of the case determine, also, whether the question is to be decided by the Court or submitted to the jury. In the Fifth Ward Savings Bank case (2) a verdict was directed as to some of the bonds, and the question submitted to the jury as to other bonds. In the American Saw Company case (3) the trial Judge allowed the question to go to the jury, and the Court of Errors held that he ought to have directed a verdict. The rule laid down in the latter case is to submit the question to the jury

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(1) 104 Fed. Rep. 214.

(2) 19 Vroom, 513.

(3) *American Saw Co. of New York* v. *First National Bank of Trenton*, 31 Vroom, 417.

if the evidence be doubtful or conflicting as to a material fact, or if the established facts admit of conflicting inferences determinative of the issue. In this case the evidence is not doubtful or conflicting; nor do the established facts, as I look at the case, admit of conflicting inferences upon any point determinative of the issue.

In all but five of the instances in which Valentine drew these drafts the drafts were raised—that is, for larger amounts than were entered on the books—and those five drafts were issued without consideration to the bank. Now, to hold that the directors can by their knowledge, or even by their express approval, authorize the cashier to make such a use of the bank's funds, and thereby bind the bank, seems to me impossible. If assent of the directors is to be presumed, it must be an assent to the whole of the transaction—that is, an assent to the issue of drafts by the cashier for his own use for a larger amount than is paid to the bank, or without any payment to the bank at all. The directors themselves are but agents, and to authorize the cashier to thus rob the bank is beyond their power. The attempt to do it would make them wrongdoers themselves, and the cashier could not legally derive any power from the action of his accomplices in the frauds.

*Anderson* v. *Kissam*, 35 Fed. Rep. 699.

A different principle applies where a case of estoppel is made out. In such a case the bank is responsible because it has put its agent, directors or cashier in a position to mislead third parties to their prejudice. We are here dealing not with a case of estoppel, but with a question of authority of the cashier sought to be inferred from a course of business; and in the absence of estoppel, I think no authority can be implied from a series of frauds. A course of business means a series of honest, not a series of dishonest, transactions. It is urged that there were some other drafts drawn for Valentine's own use, besides those to which attention

was called during the trial. It does not appear how many there were, for what amounts, or to whose order they were drawn. My recollection of Valentine's testimony is that they were not drawn to his order. I do not think they are sufficient in number to aid the defense.

It was urged, also, that the corporation itself, as distinguished from the directors, knew of Valentine's acts because it is chargeable with knowledge of what its president knew. Assuming that the knowledge of the president was proved, I think the principle invoked by the defendant does not apply. The question is not whether notice is chargeable against the corporation, but whether assent to or acquiescence in a course of conduct is to be presumed.

It was urged at the argument that the issue of this particular draft was ratified. As I understand the law of agency, there must be actual knowledge in order that there may be a ratification. This knowledge is denied by the directors, and not proven in any other way. If they had ratified by formal vote, I think such ratification would not bind the bank; for its directors are without power to ratify a theft.

It may be urged perhaps, that, although the theft of the $7,500 by Valentine could not be ratified by the directors so as to bind the bank, yet the bank may be bound by reason of laches—by failing to notify the Manufacturers' Bank for more than a year. The answer to this is that the Manufacturers' Bank has not been proved to have lost anything, or to have been in any way prejudiced by the delay. If it fails in this suit, it still has its claim against Valentine, which, as far as the evidence shows, is as good as it was on March 13, 1899.

It was further urged upon the argument that I should submit to the jury the question whether the directors did not have actual knowledge that Valentine was drawing drafts to his own order, notwithstanding their denials. Even if the circumstances were much stronger than they are against his testimony, I

should not feel justified in allowing a jury to find that the directors had testified falsely where their testimony was in itself so probable. In this case, if knowledge was to be proved, the burden of proof was on the defendant, which sought to establish that fact; this burden could clearly not be sustained by the circumstances proven in this case as against the positive denials of the witnesses. The facts of the case seem to me undisputed; the inferences to be drawn therefrom do not seem to be open to debate; the legal effect I must decide.

It is very likely, though it is not proved, that there is a practice among bank cashiers to draw drafts for their own purposes on the same terms as for other customers. It is unfortunate for the defendant that it should suffer from any reliance it may have placed upon this practice, if it be a practice; but the only safe rule is the one adopted in the cases referred to. Every one dealing with the cashier of a bank in his private matters must satisfy himself as to the cashier's authority to use the bank's funds, or suffer the consequences. Whether this rule will be ultimately adopted in this State, I cannot say, but I am convinced that it ought to be adopted; it makes for honesty.

I shall direct the jury to render a verdict for the plaintiff for $7,500 and interest from March 13, 1899.

# Supreme Court of the United States

## OCTOBER TERM, 1902.

*No. 105.*

CHARLES F. GALE, as Receiver of the Elmira National Bank, Plaintiff in Error,

*against*

THE CHASE NATIONAL BANK.

## REPLY BRIEF FOR PLAINTIFF IN ERROR.

The brief for the defendant in error makes certain observations concerning the facts of the case which perhaps call for a reply.

At page 5 it is said that the "defendant does not admit, either by pleading *or otherwise*, that the currency or the draft belonged to the Elmira bank." It made this admission when it took them on deposit to the credit of that bank. It did not allege in pleading that they did not belong to the Elmira bank. The currency is expressly stated by Bush to have belonged to the Elmira bank (Record, p. 94, foot); and Bush was defendant's witness. His deposition had indeed been taken at plaintiff's instance, but plaintiff did not care to affirm his credibility, and defendant, by in-

troducing his deposition, did so (29 Am. & Engl. Cycl. of Law, 1st ed., 812*n.*; 9 *id.*, 2d ed., 357*n.*; 21 L. R. A., 430; relying upon Cudworth *vs.* So. Car. Ins. Co., 4 Rich., 416; Richmond *vs.* Richmond, 10 Yerg., 343; Elliott *vs.* Schultz, 10 Humph., 234; Hatch *vs.* Brown, 63 Me., 410; Bloomington *vs.* Osterle, 139 Ill., 120). The evidence is uncontradicted and sustained by plaintiff's books, which charge the amount not to Bush, but to the defendant (Record, p. 95). The draft, when deposited, showed itself to be the Elmira bank's property upon its face, and was not entered in Bush's account with that bank. Moreover, the trial judge instructed the jury, as matter of fact, that both amounts were embezzled (pp. 105, 106). Had there been any defect in the proof, there would be a presumption in favor of the correctness of the statement in the absence of anything to the contrary. The presumption is always in favor of the rulings of the trial court (see Settlemeier *vs.* Sullivan, 97 U. S., 444, 449); and such presumptions may be referred to in proper cases by an appellant as well as by a respondent. (See Armstrong *vs.* Dubois, 90 N. Y., —; Wangler *vs.* Swift, *id.*, 38.) It must be assumed that there was evidence or an admission of the parties upon which the instruction was based, and in this connection it may be recalled that the Elmira bank's books were produced by plaintiff and used by defendant as well as plaintiff at the trial (Record, pp. 98–'9), and that, contrary to the usual custom, the rulings adverse to defendant, so far as they were considered to be important, have been incorporated in the record. (See pp. 50–'1, 60, 65, 67, 74, 79, 80.)

At page 12 of its brief defendant urges that the $15,012.50 item may actually have been charged to Bush's account and collected from him or paid by somebody else. Such a sug-

gestion at the trial could have been readily followed up, as the book lay open before the jury. For reasons above stated, it must be presumed, in support of the trial judge's action in directing a verdict for part of the amount, that it was admitted by the parties at the trial that there had been no payment of the check. The plaintiff having produced the check, which showed upon its own face that it was not a valid charge against the Elmira bank, and having shown that the defendant had made it the excuse of withholding $15,012.50 of that bank's moneys, the *onus* of showing that in some way the withholding could be defended was cast upon the other party; and no attempt was made to show this, although there was an attempt, which has been so far successful, to mitigate the damages.

At page 52 defendant criticises our failure to take the depositions of other directors besides Coy Kendall. The question was whether the directors had notice of Bush's signing drafts to his own order. The duty to examine drafts was deputed to Coy Kendall and two other directors. Coy Kendall was present at every meeting of this committee, and was able to swear that it never came to their attention. He was a disinterested and uncontradicted witness. His evidence was not improbable, nor self-apologetic, nor discredited by circumstances. It, therefore, must be accepted as true. There is no reason for supposing that any other director can have attempted to duplicate the work of this committee.

At page 53 defendant says that many of Bush's drafts may have been lost, as to whose existence we have no information. The trial judge did not think so (Record, p. 115). While some of his drafts had been lost, it appears that there

had been litigation in which they may have been used, and he looked up and produced, at defendant's request, the corresponding checks (p. 76). The vouchers later than November, 1892, were unimportant, because the bank's draft book showed all of them, and showed that he had obtained but two drafts of trivial amount during that period out of about 6,000 in all (p. 94). A great many drafts could not be found when plaintiff desired to produce, in the hurry of the trial, all those issued upon some particular day; but they had often been pulled over and disarranged, and there is no reason to suppose that they were not somewhere among the mass of 25,000 vouchers. (See pp. 86–94.)

Respectfully submitted, December 3, 1902.

EDWARD B. WHITNEY,
*Of Counsel for Plaintiff in Error.*

# Supreme Court of the United States,

No. 105.—October Term, 1902.

George C. Rankin, as Receiver of the Elmira National Bank, Plaintiff in Error,

*vs.*

The Chase National Bank.

**Petition for Rehearing.**

In error to the United States Circuit Court of Appeals for the Second Circuit.

The plaintiff in error, while successful in securing a reversal and direction for a new trial, nevertheless respectfully presents this petition for a rehearing. His excuse for doing so is that while the points decided by this Court in his favor entitle him to judgment for at least the sum of $7,012.50 and interest, he believes that an application of the same principle to the $8,000 item would entitle him to that item also; that he ventures to believe that certain considerations bearing upon that item may have been overlooked; that while in form he has obtained all he could ask, the opinion of the Court would restrict his opportunity for success upon this item in the courts below, and would be claimed to be "the law of the case" upon a second writ of error here; and that he desires to avoid further litigation in this case if possible.

In deciding the question raised as to the $7,000 draft, this Court says:

> "We are not, however, called upon to pass upon the rights of the parties upon the basis of what might have been done, but alone upon what was done. We may not indulge in conjecture, but must dispose of the case as depending upon the real, not the imaginary transaction."

Applying these propositions to the $8,000 currency we find the following facts relevant to the discussion: This currency was tendered by the Elmira Bank's cashier to the Chase Bank's Vice-President as part payment of a debt of his own, *and declined as such*. It was thereafter again tendered, this time as a deposit to the credit of the Elmira Bank in the latter's account, *and accepted as such*. It was accepted as a general deposit, like any other item. There was never a moment when it was in the Chase Bank's hands as the Chase Bank's property or as a part payment of the cashier's debt. Acceptance of the $8,000 as a payment by the cashier to the Chase Bank is "what might have been done." Acceptance of that sum as a sum for which the Chase Bank stood debtor to the Elmira Bank is "what was done." Both parties to the transaction treated it alike. The Elmira Bank charged it to the Chase Bank, just as the Chase Bank credited it to the Elmira Bank (Record, pp. 20, 96-7, 99).

Moreover, the defence as pleaded was based, not upon the theory that the $8,000 payment could be treated as a separate transaction, but upon the theory stated in the answer that it was specially deposited as an offset to the $15,012.50 certified check "as one transaction." This defence fails, for two reasons: first, that it was not proved, there being no such transaction recorded on the books of either bank, and there being no other amounts

credited to the Elmira Bank on the day in question which, together with this $8,000, would make an offset to the said certified check; and second, that the transaction thus admitted to be a unit was illegal, for, as stated by this court in its opinion—

> "The illegality of the check for $15,012.50 and the wrong resulting from charging it to the account of the Elmira Bank is not open to controversy."

It is respectfully submitted, therefore, that if the $8,000 be treated as a separate item, it is recoverable for the Elmira Bank because it is the property of that Bank, and was received by defendant as such; while, if it be treated as in the answer as part of a general transaction by which the $15,012.50 check was certified and charged against the Elmira Bank, the same result follows, because that transaction was without authority on the part of the cashier, and was illegal (the various grounds of illegality having been set forth in our brief at pp. 22-3, 36, 37, 42 top). The Chase Bank is not protected as a payee of currency because it never took the currency as payee, and because the rule of protection relates to a "payee of money in due course", (180 U. S., 293) and receipt of money in an illegal and wrongful transaction is not "in due course", but whatever is done in such a transaction is at one's peril.

If I am right in these views, it is respectfully submitted that a rehearing now will probably save litigation, as the Courts below will feel bound to follow all expressions in the opinion of this tribunal; and for this reason I respectfully certify that in my opinion this petition is well founded.

Respectfully submitted, March 11, 1903.

EDWARD B. WHITNEY,
Of Counsel for Plaintiff-in-Error.

No. 105.

(Br. of Thacher for K. C.)

FILED
DEC 1 1902
JAMES H. McKENNEY,
Clerk.

Filed Dec. 1, 1902.

# Supreme Court of the United States.

**OCTOBER TERM, 1902.**

**No. 105.**

CHARLES F. GALE, as Receiver of the Elmira National Bank,

*Plaintiff in Error,*

*against*

CHASE NATIONAL BANK,

*Defendant in Error.*

## BRIEF FOR DEFENDANT IN ERROR.

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# Supreme Court of the United States.

OCTOBER TERM, 1902. No. 105.

CHARLES F. GALE, as Receiver of the Elmira National Bank,
Plaintiff in Error,

AGAINST

CHASE NATIONAL BANK,
Defendant in Error.

Brief for Defendant in Error.

This case comes before the Court upon a writ of error to review a judgment of the Circuit Court of Appeals which affirms a judgment of the Circuit Court.

The judgment of the Circuit Court was in form in favor of the plaintiff, for $12.50 and interest, but substantially in favor of the defendant; and was entered upon the verdict of a jury, after a long trial, which began on Monday, October 22d, and ended on Friday, October 26th, 1900 (Record, p. 17).

The case had been previously tried before Judge TOWNSEND and a jury, the first trial beginning on October 30th and ending on November 6th, 1899. Upon the appeal from the judgment on the first trial the Circuit Court of Appeals directed a retrial of the action (104 Fed. R., 214). The opinion of the Circuit Court of Appeals on that former appeal was written by Judge SHIPMAN, before whom the second trial was had, which is the subject of the present appeal.

The claim upon which this action is based, as presented by the plaintiff, is for a balance due to El-

mira National Bank upon its deposit account in the Chase National Bank.

The claim is sought to be proved by the plaintiff (Record, pp. 20, 21) by showing a statement of that account which was rendered by the Chase National Bank, which shows upon its face a balance which it is admitted has been paid in full, and then, in impeachment of one item of charge therein against the Elmira National Bank of $15,012.50, producing a check for that amount, which he claims was improperly charged, leaving, therefore, that amount still due.

The facts relating to that charge of $15,012.50 are as follows: J. J. Bush was the cashier of the Elmira Bank. The Chase Bank held a note made by him which was originally for $25,000, but had been reduced by two payments of $5,000 each to $15,000 (Record, p. 22). This note was secured by bank stock as collateral. On the afternoon of May 4, 1893, Mr. W. H. Porter, who was the vice-president of the Chase Bank, called up Mr. Bush on the telephone, and stated that the bank stock was no longer satisfactory to the directors of the Chase Bank as collateral, and asked him to improve the collateral; he replied that he would pay off the loan the next morning. The next morning (May 5th) he called on Mr. Porter at the Chase Bank, and stated that he had come to pay his loan, and tendered for that purpose a package of cash—to the amount of $8,000—and a cashier's draft of the Elmira National Bank, drawn to Bush's order, on the Quaker City National Bank, for $7,000. Mr. Porter told him that a draft on Philadelphia could not be taken as cash in payment of a note payable in New York City. Mr. Bush was anxious to use the draft, and asked Mr. Porter if he could suggest how this could be done. Mr. Porter stated that he knew no way unless he drew his personal check on the Elmira Bank for the amount of the loan, and, as cashier, endorsed it as accepted and payable at the Chase Bank, which would make it *New York funds* available to pay a note payable in New York City, and, at the same

time, deposited the $8,000 currency and the $7,000 draft to the credit of his bank. Bush accepted this plan, and it was carried out, the check being for the amount of the note, with $12.50 of interest added. The deposit of the cash and draft and the drawing and charging of the check were thus parts of a single transaction carried through for the purpose of using the cash and draft to pay the note to the Chase Bank. The $8,000 cash appears credited to the Elmira Bank on May 5th in the statement of account above mentioned, and the $7,000 draft was subsequently paid by the Mercants' Bank of Philadelphia, and appears credited on said statement of account on May 8, 1893, the date of its payment. These two items of $8,000 and $7,000 are a part of the items making up the credit side of the deposit account upon which the plaintiff bases his claim of an obligation of the Chase Bank to pay (Exhibit B, Record, p. 20).

The testimony as to the transaction in which this deposit was made and this check drawn was given by William H. Porter, who in 1893 was vice-president of the Chase Bank, but who from January 1, 1899, has been vice-president of the Chemical Bank in this city (Record, pp. 21–24), and by Stephen Voorhees, who on May 5, 1893, was discount clerk of the Chase Bank, but who from July, 1899, has been the New York agent of the Merchants' Bank of Halifax (Record, pp. 32–34). There is no conflict of evidence with regard to this transaction, excepting as to the original form of the $7,000 draft, Bush the only other party to it, though his deposition was taken by plaintiff (Record, p. 34), not having been asked by him to in any way contradict it. The question as to the $7,000 draft is whether when it was originally presented to the Chase Bank it was drawn to the order of J. J. Bush, or of J. J. Bush, cashier. In its present form it is to the order of J. J. Bush, cashier; but Mr. Porter testified explicitly that when first presented to him on the morning of May 5th it was drawn to the order of J. J. Bush, and the word "cashier" was not written there, but that after it had

been decided to make the deposit Mr. Bush endorsed it, signing his name J. J. Bush, cashier, and then, seeing that this did not correspond to the face, to make the face correspond to the endorsement, wrote in the word "Cashier" (Record, pp. 26, 29,30):

> "He added the word 'cashier' on the $7,000 "Quaker City draft in my presence. * * * The "addition of the word 'cashier' was made in my "presence after the endorsement on the check. "I was present and saw the addition made there" (p. 29).

Against this direct testimony is some inconclusive testimony by Bush in his deposition (Record, p. 98) and some expert opinion evidence by the witness Kingsley (Record, p. 97).

At the time of taking this check and draft Mr. Porter believed that they were Bush's own property, which he had a right to use in payment of his own debts (Record, p. 26); he had at that time known Bush for some years, and, so far as he knew, he was of good standing and reputation in the community; he had not the slightest reason, so far as he knew, to doubt his right to do what he did on May 5th; he had been highly recommended to the Chase Bank as to his integrity and standing in the community (Record, p. 32).

Probably it would not be possible for either party to this case to make a statement of the result of the evidence as to the transaction between Bush and The Chase Bank without giving it color which would in some respects be misleading. The whole testimony as to this transaction is given by Porter and Voorhees. This is brief and clear, and is included in pages 21 to 34 of the Record, and we would respectfully request the Court that they consider this testimony directly, rather than any statement of it made by either party.

The evidence as to the authority of Bush, the cashier, to draw drafts in his own business, is stated with considerable fullness in Point XI. below, and the facts tending to show how far the investigation in the case has probably elicited all the pertinent facts are also there discussed, and a reference to that Point will probably be more useful than a direct criticism of the statement of facts of the plaintiff in these respects.

The defendant does not admit, either by pleading or otherwise, that the currency or the draft belonged to the Elmira Bank.

The note and collateral of Bush remained in defendant's possession simply for the convenience of Bush, and subject to his order, and without any rights therein of the defendant, which did not, after the payment on May 5th, remain in any sense the owner of the draft or holder of the stock as collateral, or entitled to enforce them (pages 24, 33, 34 and 82).

As to plaintiff's suggestion that the seven thousand dollar draft was originally drawn for a blank amount and filled up for $7,000 at The Chase Bank, there is nothing to support this suggestion in the evidence excepting the statement of the handwriting expert that the words "seven thousand" were apparently in the same ink as certain other writing on that draft, though it does not appear by his testimony that the figures "$7,000" were also in that ink (page 97). On the other hand, Porter testifies directly that Bush took the currency and draft from his satchel (page 22), and that when Porter first saw it, it was a complete draft for $7,000 (page 29).

The plaintiff claims that the $8,000 cash was the property of the Elmira National Bank, and that he had no authority to draw the $7,000 draft, but this does not appear in his pleading.

As it is admitted that the balance appearing on the *face* of the account has been paid in full (Record, pp. 20, 21), and no other items in it are in any way brought

into question by either side, no attention need be given in this case to any but the said items of $15,012.50, $8,000 and $7,060.

The subject which has so far in this litigation been the principal subject of controversy is the question of the authority of Bush, as cashier of the Elmira Bank, to draw cashier's drafts of that bank for use in his own business. This subject we have discussed at very considerable length in Point XI. below. There are, however, other points which seem to us important, and, in fact, substantially decisive of the case, even if no such authority were shown, and which, therefore, logically seem proper to be presented before the discussion of such authority, and we have, therefore, followed this order in this brief.

## POINT I.

### Errors not prejudicial to plaintiff are immaterial.

Therefore, if upon the record, on *any ground*, defendant was entitled as matter of law to a verdict to the extent of that rendered, errors, if any, in the conduct of the trial do not require a reversal.

"No judgment should be reversed in a court of "error when it is clear that the error could not have "prejudiced, and did not prejudice, the rights of the "party against whom the error was made."

Lancaster vs. Collins, 115 U. S., 222, 227.
Fidelity & Deposit Co. vs. Courtney, 186 U. S., 342, 351.
Cleary vs. Ellis Foundry Co., 132 U. S., 612, 614.

## POINT II.

**The claim of plaintiff as presented on the trial in this action is in contract for balance due on a deposit account in a bank. He cannot in this action recover for any other cause of action.**

The original complaint(Record, pp. 5–8) may be uncertain as to the intended basis of the claim for damages, and incomplete in the statement of a cause of action either for conversion, or in contract for a balance of account; it does not state any fund or balance with the Chase Bank, and may be open to the objection that no cause of action is stated in it. As a result of objection on this ground at the first trial, the plaintiff procured an order at that trial for an amendment of the complaint, apparently intended to state that there was a balance of $15,012.50 unpaid upon the account, payment whereof was demanded and refused (p. 9).

If there remains a doubt on the face of the pleading after this amendment as to the nature of the claim asserted, the plaintiff, by his presentation of his case, has put a construction upon it which is clear and conclusive upon him.

*His whole case is contained in a page and a half of the record (Record, pp. 20, 21), to which we call the particular attention of the Court.* It is as follows: *First*, a letter from the Chase Bank to Davis, the former Receiver, enclosing a statement of the deposit account of the Elmira Bank in the Chase Bank for the month of May, 1893; *then* that whole statement of account showing a resulting balance of $20,312.88 in favor of the Elmira Bank; *then* the check for $15,012.50, which is described in the complaint; *then* certain evidence of a demand and refusal; *then* an admission that the balance of $20,312.88, appearing on the face of the statement of account, had been *paid*, and an

unaccepted tender in court to counsel for the Chase Bank of the check for $15,012.50.

His case consisted of the admissions contained in the statement of account—namely, of the balance in that account brought over from the previous month, and of the various deposits during the month of May, but qualified by all of the statements of debit, also contained in the account, so that the final result of the admissions was that there was due to the Elmira Bank simply the sum of $20,312.88, which it is conceded has been paid; and then, in partial *contradiction* of this evidence, the *affirmative* impeachment of the item of May 5th for $15,012.50; the result being, according to the plaintiff's claim, that in this deposit account $15,-012.50 less was paid to or on the order of the Elmira Bank than the account stated, so that of the credits therein stated a balance of that amount still remains unpaid upon the account.

*This is the whole case which he presents and asks the defendant to meet.*

There is neither in the *complaint* nor in the plaintiff's *case* any statement or evidence as to the nature of the *items of $8,000 and $7,000*, nor any distinction between those items and any other items to the credit of the Elmira Bank in this account, and absolutely no basis laid for any claim, excepting on the theory of a balance due on the total account.

It is most familiar law, rigorously insisted on in the Courts of New York, that a recovery in an action can only be upon facts *alleged in the complaint.* It must be not only in accordance with the proofs, but in accordance with the pleading, and this notwithstanding the liberality of the New York Code.

Neudecker vs. Kohlberg, 81 N. Y., 296, 301.
Southwick vs. First National Bank, 84 N. Y., 420, 429.
Romeyn vs. Sickels, 108 N. Y., 650, 652.
Truesdell vs. Sarles, 104 N. Y., 164, 167.

"The party must recover not only by his

" proof, but upon his *allegations.* The facts " stated must constitute a cause of action, *and* " they must be in evidence. It is not enough that " they stand upon proof, unless that proof is *pre-* " *ceded by statement.*"

Clark vs. Post, 113 N. Y., 17, 27.

*Southwick vs. First National Bank* is significantly in point.

Any burden arising from any doubtful nature of the complaint rests on the plaintiff.

Clark vs Dillon, 97 N. Y., 370, 373, 374.
Southwick vs. First National Bank, 84 N. Y., 420, 429.

It is proper and fair to insist upon this Point, because the plaintiff seems to have sought, by presenting his claim in this form, instead of suing openly and directly for the $8,000 and $7,000, to secure to himself some technical advantage, and to avoid or obscure the burdens which would rest upon him in such a suit.

## POINT III.

**The plaintiff, to charge the defendant, must affirmatively prove that the charge of $15,012.50 was without authority and improper, and he has failed to do so.**

This is so even if all the credits appearing in the statement of account correctly represent deposits actually made with such intent and in such manner that the ordinary contract in favor of the Elmira Bank as a depositor arose thereon.

The allegation of a balance in plaintiff's favor is contained in the amendment of the complaint, made by the order of October 31st, 1899 (p. 9), and, by the

terms of the order, is deemed controverted (p. 10). This fact, essential to plaintiff's case, is put in issue, and must be proved. It is part of his case, and the burden of proving it is upon him, and *remains with him throughout the case.*

Whitlatch vs. Fidelity Co., 149 N. Y., 45, 50.
Kay vs. Met. Street Ry., 163 N. Y., 447, 453.

By the mode adopted by him of proving his case by introducing in evidence the statement of account the plaintiff peculiarly charges himself with the burden of affirmatively disproving this item. The entire admission, the part that discharges, as well as that which charges, the defendant is in evidence.

Insurance Co. vs. Newton, 22 Wall., 32, 35.
Grattan vs. Metropolitan Ins. Co., 92 N. Y., 274, 284.

In *Wheeling Bridge & T. Ry. Co. vs. Franzheim (93 Fed. Rep., 617)*, the plaintiff's only substantial evidence was a statement of account rendered by the defendant, which showed a balance in defendants' favor, and the Court said (p. 620):

> "There was, in fact, nothing for the jury to act "upon except the account, and the whole of that "was before them, and it was their duty to con- "sider *the whole of it.* * * * *The burden was* "*upon the plaintiff to the end* to prove its case "by a fair preponderance of evidence."

And at page 619 quoted from 2 Tayl. Ev., Sec. 726:

> "Where a defendant has rendered a debtor "and creditor account to the plaintiff, which the "latter *produces* in proof of his demand, it will "be equally admissible in evidence of the de- "fendant's set-off, though the plaintiff will be "generally at liberty, while relying on the creditor "side of the account, *to impeach* items which ap- "pear on the debtor side."

By his mode of proof it became (if not so already) a, *part of his case* to prove the impropriety of the $15-012.50 charge.

The plaintiff did not prove that the charge of $15,-012.50 was without authority and improper.

The sole evidence of plaintiff as to this charge was the bare check itself for $15,012.50, with the endorsements thereon. There is *no scintilla of evidence* that Bush had not authority from his bank to make the endorsements.

Bush may have had authority or right from his bank to make the directions contained in the endorsement, or they may have been subsequently ratified or accepted by his bank.

The evidence as to his authority to draw drafts for his own benefit, which is hereafter discussed, *is also evidence of his authority to endorse this direction*, which is in effect a draft.

> " An acceptance or promissory note thus payable
> " is if the party is in funds, that is, has the
> " amount to his credit, equivalent to a check, and
> " is in effect an order or *draft* on the banker in
> " favor of the holder for the amount of the note
> " or acceptance."
>
> Ætna Bank vs. Fourth National Bank, 46 N. Y., 82, 88.

The Chase Bank is not trying to *enforce* a claim based upon an act done by the cashier. If it were, it must, of course, prove the authority, as a part of its case. Here money has been paid and charged upon an order given by the cashier and his bank is affirmatively attacking that transaction. It must prove, as part of its case, that the act was done without authority or other right or ratification.

The burden of proof often requires a party to prove a negative.

> Colorado Co. vs. U. S., 123 U. S., 307, 317-319.

Stokes vs. Stokes, 155 N. Y., 581, 586.
Roberts vs. Chittenden, 83 N. Y., 33, 35.
Gildersleeve vs. Landon, 73 N. Y., 609, 610.

In the last case it was held necessary to prove a negative in order to overthrow part of an admission relied on.

If the endorsement was without authority, Bush was using bank funds for himself, and was guilty of a crime. The presumption should be against such a crime.

Colorado Co. vs., U. S., 123 U. S., 307.

The bare fact that the check was used to pay Bush's note would not be enough to prove that he was without the authority to make the indorsement. The nature of the rule regarding acts of agents for their own benefit is discussed below (Point XI.). It is not the law that an agent *cannot* have such authority. It was quite possible that Bush had authority to make the endorsement. There is no evidence of the state of his account at the Elmira Bank. It may have been good for this check, which may have been charged against it, or may have been otherwise settled, either by himself, or by others on his behalf. There may have been many reasons why authority to so draw upon the Elmira Bank's account either in this matter particularly, or in similar circumstances generally, should have been given. The Court and jury *certainly did not know that it was not.*

The fact that the check was *certified*, or that the endorsement was *made at a place other than the Elmira Bank* is immaterial.

In Merchants' Bank vs. State Bank, 10 Wallace, 605, 650, the Court say :

> " It is objected that the checks were not certified
> " by the cashier *at his banking house.* The pro-
> " vision of the act of Congress as to the place of
> " business of the banks created under it *must be*

" *construed reasonably.* The business of every " bank, away from its office—frequently large and " important—is unavoidably done at the proper " place by the cashier in person, or by corre- " spondents or other agents * * * *There is* " *no force in this objection.*"

An endorsement made by a cashier on the street after banking hours is binding.

Bissell vs. First Nat. Bk., 69 Pa. St., 415 :

Representations by a cashier to a purchaser of a note endorsed by him as cashier which were made at a city other than that in which the bank was, were held binding on the bank, and an objection that the representations were not made at the bank was said to be *without merit.*

Houghton vs. First Nat. Bk., 26 Wis., 663, 670 :

Whatever objection there might be to the certification, *it was not acted on*, and from the nature of the transaction it could not have been intended to be acted on, the direction to pay at the Chase Bank being sufficient for all the purposes intended. It is therefore not material to the case. It has been suggested that the certification was a crime; but it has been held that in the crime of unlawful certification more is necessary than the mere writing of the words; it must be so done as to create an obligation of the bank, and the violation must be willful, which means not merely with knowledge, but with evil intent.

Potter vs. U. S., 155 U. S., 438, 444, 446.

Under the circumstances of this " certification," even if it were material to the case, and had had any effect upon the transaction, we think the Court is not in a position to say that the act was criminal.

Plaintiff has therefore failed to impeach the charge

for $15,012.50, or to prove that it was unauthorized and improper, and has therefore failed to prove that there is any balance due to him from the defendant.

## POINT IV.

**The plaintiff cannot, herein, question any of the facts or transactions leading up to or constituting the deposit of the $8,000 or $7,000.**

His claim, as presented by him, *depends upon* these deposits. Without them there is no basis for a recovery; no obligation on the part of the Chase Bank to pay. His evidence of this obligation is the credits in the statement of account, and these two items among those credits are essential to his claim. If they are excluded, there is nothing due him, except the $12.50.

His claim, *as he presents it*, therefore *affirms* and *adopts* the transactions involved in these deposits; and in this suit he cannot question their validity or legal propriety.

> In Wilson vs. Pauly, 72 Fed. R., 129, it was held that though a bank might have resisted a claim on the ground that the president had no authority, " here, *by bringing suit* upon the notes, the *agency* " by which they were obtained is *adopted* in an em- " phatic way, and the act is ratified. * * * In " an action to enforce *against the principal* a con- " tract made by an agent acting without authority, " but which has subsequently been ratified by " the principal, it is necessary to show that the " ratification was made with knowledge of the " circumstances. But when the *principal brings*

" *the action*, and the circumstances are proven in " defense, he is not entitled to judgment in disre- " gard of them.' "

In this case plaintiff will not deny the fullest knowledge of the fact. Such knowledge is apparent from the whole course of the case, from the depositions taken by him both before the last trial (of Bush and Coykendall) and before the first trial (of Edison and Batterson).

The decision in 104 Federal Reporter, 214, shows that the facts were fully understood and litigated in the first trial.

In the case as now presented, therefore, the question of the authority of Bush in the matter of the cash or the checks disappears. *Any argument which denies the right of Bush to make the deposits bars the right of the plaintiff to recover on those deposits.*

All that was prior to the deposit, and necessary to it, is affirmed. The plaintiff, therefore, affirms the taking of the cash and drawing of the draft by Bush, and cannot in this action question those acts.

Moreover, in choosing to stand upon and adopt the deposits, knowing the facts, plaintiff necessarily adopts them as they were made, and upon the *terms* and understanding upon which they were made. If what was done was *not*, taken in its whole effect, a deposit of these sums upon a contract such as is involved in what is known as a deposit account, then the basis upon which he has elected to sue in this action is gone, and he can not recover herein.

Plaintiff knew what the transaction was. If he wished to disaffirm it, he should have taken some other form of action.

## POINT V.

**In fact there was only charged against the defendant in the transaction of May 5th the $12.50, which with interest was awarded to plaintiff by the jury.**

The evidence of Porter, corroborated by that of Voorhees, is uncontradicted and fully explains the transaction of May 5th and the entries made in relation thereto. It shows that on May 5th $8,000 in cash was received from Bush and in form entered under that date to the credit of the Elmira Bank; at the same time a draft for $7,000 on the Quaker City Bank of Philadelphia was similarly received, and the amount thereof was on the 8th day of May paid by the Quaker City Bank to the Chase Bank and in form entered under that date to the credit of the Elmira National Bank; the check for $15,012.50 was on May 5th received from Bush and in form charged against the Elmira Bank; and the delivery and credit of the $8,000 cash and the $7,000 draft, and the proceeds of it, and the drawing and charging of the $15,012.50 check, were all parts of a single transaction for a single purpose, and the net result of that transaction, *as made and as intended*, was simply to charge the Elmira Bank with $12.50.

So far as this action for the balance of the account is concerned it is immaterial what the credit items of $8,000 and $7,000 represented. It is not necessary to the defense to show that they represented anything. The material fact is that as *against a charge* of $15,012.50, as a part of the same transaction, the Chase Bank *gave a credit* of $15,000. The Elmira Bank, claiming the benefit of that credit as a deposit, cannot question the right or authority of the person making the deposit; and it cannot, while claiming the benefit of part of the transaction, discard the other part. It

must take it as a whole and upon the terms upon which it was made, or abandon its claim as a claim for the deposit.

Therefore, if the charge by reason of the form in which the check was drawn and endorsed, or the lack of the right or authority of the cashier to make that endorsement, is an improper charge, the amount of the charge whose impropriety is thus shown is only the amount of the *net charge* made in this transaction, that is to say $12.50.

## POINT VI.

### Plaintiff did not prove that the $8,000 and $7,000 were in fact so deposited as to charge the defendant with a contract to pay them to the plaintiff.

If it is true that the items of $8,000 and $7,000 credited in the account never were credited with an intention of *thereby admitting an indebtedness* to the Elmira Bank, but *merely to offset* and make good this very counter-charge of $15,012.50, then certainly the whole case falls; falls without regard to whether the $15,012.50 is properly chargeable against the Elmira Bank or not because the *admissions on the credit side of the account* of these items are the only basis for any recovery in the case.

Now, the testimony shows that these two items on the credit side of this account, two apparent admissions of indebtedness to the plaintiff aggregating $15,000, were never intended as such, and did not represent a transaction in which such an indebtedness was created. The currency and the Philadelphia check which are the basis of those two entries were not offered as deposits by the Elmira National Bank or for it, they were not supposed by defendant to be-

long to it. They were not entered as they were with any intention of establishing or admitting the relation *of debt to the Elmira Bank*, or of giving it any right to draw against them. They were put there merely to be withdrawn by the simultaneous $15,012.50 check, to authorize, justify and make good that transaction. As explained by the evidence, they have no effect as *admissions of indebtedness* to the plaintiff.

The statement of account is not sued on or presented as an account stated. No suggestion of that has ever been made. It has never been accepted. It stands simply as *evidence*, open, like any other evidence, to explanation or contradiction.

An action for a balance of deposit is an action upon a contract of the depositary bank to pay to the depositor, or on his order, the amount deposited, and the contract arises when sums of money are deposited by the depositor or for his benefit, with the intent, or upon the understanding or agreement, that they shall be so repaid as a part of the sums covered by the deposit account.

It is a contract of debt.

Marine Bk. vs. Fulton Bk., 2 Wall., 252, 256.
Nat. Bk. vs. Ins. Co., 104 U. S., 54, 66.
Bk. of Republic vs. Nat. Park Bk., 10 Wall., 152, 155.

The plaintiff was, therefore, bound to prove that the items on which he relies to make up the credit side of the account were deposited, and in such manner that this "deposit account" agreement arose in relation to them.

In the order amending the complaint (pp. 9, 10), in which is the only allegation of a balance due, it is provided that the allegation shall be deemed controverted. The denial in the answer (pp. 11, 12) of the allegations that the $15,012.50 was charged in the account against the Elmira Bank, and retained out of its funds, in effect raises the same issue. The ambiguity of the allegations made it necessary to make the denial particular

in its statements, so that it should not be misinterpreted, or broader than the facts, but the *issue is made by the denial of the allegations of the complaint.*

As to the $8,000 and $7,000 items the transaction really was that they were "deposited" on special terms, for a special purpose, to be carried out as part of the same transaction, and, in fact, and in legal effect, the "deposit account" contract never attached to them. As to those items the *plaintiff must discharge his burden of proof.*

The only evidence offered by plaintiff to prove that any contract or liability was entered into by the Chase Bank with reference to them was the statement of account (Exh. B, p. 20), which he introduced in gross—all the items, both of credit and debit—in no way distinguishing from the other credit items, or calling attention to, either of the $8,000 and $7,000 credits, which upon his case simply stood as two among numerous credits, together leading up to a resulting balance.

The statement on the face of the account was undoubtedly *prima facie* evidence that these items were so deposited. But the actual facts of the transaction were testified to by Porter and Voorhees, and there is no other evidence tending to the contrary of their statements. There can be no practical question that their evidence is true. Plaintiff's counsel took the deposition of Bush, the only other party to that transaction, and did not attempt to elicit from him anything contradictory. The story of Porter and Voorhees is definite and complete, and establishes beyond a question that the delivery and deposit of the $8,000 and $7,000 were made by Bush for the purpose of paying his note, and of paying it through the medium of the $15,012.50 check, which was at the same time drawn, delivered and charged, and upon that understanding; that they were thus made for a limited, definite purpose, and not for the general purpose nor under the general contract that the plaintiff should pay those moneys on the order of the Elmira Bank as a part of

its deposit account, but for the purpose and with the understanding that they should provide for the immediate drawing of that check. The deposit was made for this purpose, and was necessarily subject to it. It was made on no other terms, and, if it stands at all, it must stand on those terms.

It will clear the case of some confusion and obscurity if we separate out some elements which do not tend to charge the defendant with a liability.

If a stranger to the Elmira Bank had made a deposit to the account of the Elmira Bank in form, and in form immediately, in pursuance of a previous understanding, drawn against it, and the Chase Bank had recognized that draft and entered the items in the Elmira Bank account, there would be nothing in the transaction which would entitle the Elmira Bank to claim the amount deposited. There would have been no contract arising in the transaction to pay that money on the order of the Elmira Bank. If Bush, having money unquestionably his own, had deposited it at the Chase Bank to the credit of the Elmira Bank, and, in pursuance of a prior understanding, immediately drawn it out, there would, similarly, have been nothing in the transaction to entitle the Elmira Bank to claim from the Chase Bank the amount so deposited. The "impropriety," if any there be, in so *trifling with* the account of the Elmira Bank, and the annoyance or inconvenience to that bank of inquiring about the items consequently appearing in the statements rendered to it, are immaterial to the question. They do not supply any contract for the payment of the money to the Elmira Bank.

It is therefore clear that if the Elmira Bank or its Receiver had any cause of action it must have arisen *not* upon the fact of the *deposit and the draft against it*, but upon some *different* or additional state of circumstances.

No reference to any such circumstances is made in the complaint, nor in the plaintiff's case.

## POINT VII.

**Even if not restricted by the form of the action, plaintiff could not recover the $8,000 of cash.**

This sum was received by the bank for the purpose of payment upon the note which it held. Porter testifies that at the time of its receipt he believed that it was Bush's own money and he had not the slightest reason to doubt Bush's right to do what he did in the transaction of May 5th (pp. 26, 32). The question of the good faith of the bank in receiving the money was left to the jury and decided by them in favor of the bank, and upon the common rules of law relating to receipts of cash no recovery of this sum can be had.

Goshen Nat. Bk. vs. State, 141 N. Y., 379, 385.

Holly vs. Missionary Soc., 180 U. S., 284, 293–4.

Nassau Bk. vs. Bk. of Newburgh, 32 N. Y. App. Div., 268, 270; 159 N. Y., 456.

## POINT VIII.

**Even if not restricted by the form of the action, plaintiff could not recover for the $7,000 received upon the draft.**

*(a)*

This sum was received in money not from the Elmira Bank, but from the Quaker City Bank, of Philadelphia, and if the draft or order upon which it was paid was not in fact the order of the Elmira Bank the Quaker City Bank had the right to recover that money from the Chase Bank. There is no evidence that the

Elmira Bank has paid the Quaker City Bank or given it credit for the payment.

*(b)*

A claim to recover this $7,000 as improperly paid to the Chase Bank upon this draft would be an affirmative claim by the plaintiff to recover back money already received upon an order made by one claiming authority, and not a case in which the Chase Bank was suing upon or trying to enforce the draft. It would therefore be no part of the Chase Bank's case to prove the authority; but the whole *burden* of the case, including the burden of *alleging* and *proving* such want of authority would be on the plaintiff. In such case it is very clear that this burden is upon the plaintiff (see the reasoning under Point III.) He must affirmatively prove this lack of authority and he has made no pretense of such proof.

The difference of situation between one suing to enforce a draft and one suing to *recover money already paid* on it is insisted on in *Southwick vs. First Nat. Bk., 84 N. Y., 420, 436-7.*

*(c)*

Authority to draw the draft (Point XI.) and the good faith of the bank in taking it (pp. 26, 32) were proved.

## POINT IX.

**The plaintiff having retained, until the time of the trial, the $15,012.50 check, cannot recover.**

The $15,012.50 check a copy of which is contained in the complaint, page 7, was drawn by Bush, and

if it was not properly payable and charged at the Chase Bank as directed in the endorsement, then Bush was individually liable upon it. It came into the hands of the Receiver of the Elmira Bank on or about June 6th, 1893 (pp. 20, 21). There is no suggestion or evidence that it was ever surrendered or offered to the Chase Bank until the first day of the second trial of this case on October 22d, 1900 (p. 21), when it was in the hands of plaintiff's counsel. If it had been surrendered to the Chase Bank, that bank might have obtained the amount thereof from Bush. Moreover, without offer of such surrender no effective demand of payment upon the Chase Bank could have been made.

Demand is necessary before suit on a deposit account.

Paine vs. Gardiner, 29 N. Y., 146, 155.
Pardee vs. Fish, 60 N. Y., 265, 270.
Thomas vs. Bk. of Brit. N. Am., 82 N. Y., 1, 8.
Bk. of Brit. N. Am. vs. Mer. Nat. Bk., 91 N. Y., 106, 110.
Munger vs. Albany Bk., 85 N. Y., 580, 587.

## POINT X.

### Proof of the authority of the cashier to draw the cashier's draft was not necessary.

By his form of action, in which he claims under this draft, plaintiff has barred himself from disputing its validity (Point IV.). But if he had not, the authority of the cashier is established.

In Point XI. the rule of presumption or construction against the authority of an agent to act for his principal when he is himself concerned is discussed at length. That rule is one adopted by the Courts from considera-

tions generally supporting such presumption or construction, but it is not necessarily of universal application and free from exception any more than other rules of presumption or construction; and if the notorious and public usages are such as, in a particular class of cases, tend to support a different presumption or construction, the Courts are free to so declare.

Cashier's drafts are used in great quantities throughout the financial world. They are freely and unhesitatingly accepted; and it is desirable that they should be. They are one of the commonest and most important means of making payments in distant places. That they have generally been so used by cashiers as well as by others does not admit of practical doubt. They are issued by banks in regular course of business, and as a matter of course upon proper consideration. Their issue does not involve questions of judgment or discretion. There seems to be no reason why banks should require their cashiers to resort to other banks for such drafts, or to believe that they do so require or expect. That would be detrimental to the standing of the cashier. Bank cashiers customarily, and certainly with the consent and approval of their banks keep deposit accounts with their banks, and either directly or through their subordinates manage and supervise those accounts and pay checks thereon. It may well be considered that, being allowed to be thus customers of the bank, it is intended and implied that they shall have the ordinary facilities and advantages of customers. There is no reason to deny the right to use cashiers' drafts, for fear that they may improperly take them without consideration, which would not also forbid their having deposit accounts, for fear that they might be overdrawn. The right of cashiers to act in their own behalf in some matters certainly is intended and admitted, and legally exists—courts certainly will recognize it, and deem it implied without proof. It is not necessary to deny it in any of the ordinary matters customary in dealings

with depositors and not of a nature involving discretion. As to cashiers' drafts the use and custom have been such that courts are well justified in concluding that there is *no presumption* that the issue of them to the cashier, on the same terms as to customers in general is *not* intended to be included in his general authority.

A court of high authority, and in the State where the largest part of our financial and banking transactions occur, has declared, deliberately and with iteration, that in view of the common and notorious general public use of cashier's drafts they *should be deemed* within the general authority of cashier when drawn to his own order.

Goshen Nat. Bank vs. State, 141 N. Y., 379, 387.

It is true that the Court in this case considered that the authority of the cashier to draw drafts in his own favor was expressly proved; but the position that such proof was unnecessary, and that the act was included within his general powers was deliberately taken; and this is emphasized by the fact that PECKHAM, J., who wrote the opinion, said of this case, in writing the opinion of the Court in

Bank of N. Y. vs. Am. Dock & T. Co., 143 N. Y., 559, 565.

> " We also held, for reasons therein stated, that
> " there was a difference in the case of bank or
> " cashier's drafts from most other cases of agency."

Both of the opinions were unanimously concurred in.

Some of the United States Courts seem to have differed from the conclusions of these cases.

Anderson vs. Kissam, 35 Fed. Rep., 699.
Samson vs. Beard, 94 Fed. Rep., 30.

But the question has not yet been decided in this Court, and on the appeal in the case of *Anderson vs.*

*Kissam*, which was decided in this court on another ground, this Court pointedly intimated that at least it was not ready to concur with the Circuit Court upon this point.

Kissam vs. Anderson, 145 U. S., 435, 441.

In addition to the general authority implied from the cashier's position, there was in the present case the by-law expressly providing for the signature of all drafts by the president or cashier (p. 62).

## POINT XI.

**Abundant evidence was given by the defendant to prove the authority of the cashier to draw such draft, and the verdict of the jury is decisive.**

The burden of proving that this sum, paid to the Chase Bank through the transaction of May 5th, was, originally or ultimately, paid out of the property of the Elmira Bank, *and without its authority*, was on the plaintiff; provided that in this action he is permitted to question that authority and to prove those facts (see Points II., IV., V.). But the defendant has submitted evidence in support of that authority, and the jury has passed upon it.

The rule which restricts the powers of agents to act for their principals in transactions in which they are interested upon the other side is a general rule of construction in the law of agency, not arising especially out of any relations of officers to corporations in general or to banks in particular.

It has been held that this rule should not be applied to the case of cashiers' drafts (see Point X.).

The rule is one not of power but of construction. It has never been held that authority *cannot* be given to an agent to act where he is individually interested. The cases constantly recognize that it may be given. In fact, it is the rule, frequently asserted, that where an agent does act in such cases his act is not void, but is *only voidable* at the election of the principal.

Thomas vs. Brownsville R. R. Co., 109 U. S., 522, 524.
Twin Lick Oil Co. vs. Marbury, 91 U. S., 587, 589.
Hammond vs. Hopkins, 143 U. S., 224, 251.
Duncomb vs. N. Y., N. H. & H. R. R., 84 N. Y., 190, 199.
Jessup vs. Ill. Cent. R. R., 43 Fed. R., 483, 503.
Coe vs. East. & W. R. R., 52 Fed. R., 531, 543.

The rule is simply one of *construction* of powers, and the *extent* of it is that, where nothing appears but a power given in general terms to an agent to act for his principal, in the absence of special evidence of intention, it will *not be held to extend* to acts in which the agent is interested on the other side, and that, where a power is implied from the existence of an office or other relation, such implied power will not be held to extend to such case.

The nature of the rule quite clearly appears in the opinion of PECKHAM, J., in *Bank of New York vs. American Dock & T. Co. (143 N. Y., 559, 563, 564):*

> "We come then to the consideration of the "proper *construction* of the by-law. In the light "of the *general rules of law upon the subject of* "*principal and agent* we are of the opinion that "the by-law or resolution in question ought not "to be *construed* as clothing either the president "or the treasurer with any authority to issue "receipts to *himself* for cotton, which in truth "had been deposited by him. It is an acknowl-"edged principle of the law of agents that a

> " *general power* or authority given to the agent to
> " do an act in behalf of the principal *does not*
> " *extend* to a case where it appears that the agent
> " himself is the person interested on the other
> " side. *If* such a power is intended to be given,
> " it must be expressed in language so plain that
> " no other interpretation can rationally be
> " given it."

The extent of the rule is likewise indicated in the opinion of WAITE, C. J., in *West St. Louis Bank vs. Shawnee County Bank, 95 U. S., 557, 559*, where he says :

> " Ordinarily the cashier, being the executive
> " officer of a bank, is *presumed* to have, in the
> " absence of positive restrictions, all the power
> " necessary for such an officer in the transaction
> " of the legitimate business of banking. * * *
> " But certainly he is not *presumed* to have power
> " *by reason of his official position* to bind his bank
> " as an accommodation endorser of his own
> " promissory note. Such a transaction would not
> " be within the scope of his *general powers*, and
> " one who accepts an endorsement of that char-
> " acter, and contest arises, must *prove actual*
> " *authority* before he can recover. The very form
> " of the paper itself carries notice to a purchaser
> " of a *possible want* of power to make the endorse-
> " ment, and is sufficient to put him on *his guard*."

The existence of such a power was held to have been established in

> Hanover Bank vs. American Dock & T. Co., 148 N. Y., 612.
> Goshen Bank vs. State of New York, 141 N. Y., 379.
> Reynolds vs. Bk. of Mt. Vernon, 6 App. Div., 62, 68; affirmed on opinion below, 158 N. Y., 740.

It is clearly recognized that such power *may* be given in *Anderson vs. Kissam, 35 Fed. Rep., 699*, in which the jury were instructed (p. 702) that they might find upon the evidence that the cashier was permitted by the directors of the bank to draw such checks for his own use, and WALLACE, J., on the appeal said (p. 704):

> "The party dealing with him must take notice
> " of his want of authority and cannot treat it as an
> " obligation of the principal *unless* he can prove
> " the existence of some special and extraordinary
> " authority on the part of the agent."

And again (p. 705):

> " If the circumstances were sufficiently notori-
> " ous and peremptory * * * they would afford
> " *sufficient evidence* of Warner's *authority* to use
> " the funds of the bank as he did, and would have
> " justified the defendants in relying upon the os-
> " tensible authority evinced by the acquiescence
> " and recognition of the directors."

And again (p. 706):

> " When he has information that the agent who
> " has made the paper has made it in the name of
> " the principal for his own use he must be prepared
> " to show that special *authority in that behalf has*
> " *been delegated* by the principal and cannot rely
> " upon the implied authority of the agent to make
> " such paper in the ordinary business of the
> " principal."

In that case the question was left to the jury and the jury found that no such authority was given.

The possibility of such authority being given is also recognized in *Lamson vs. Beard, 94 Fed. Rep., 30*. Three cases are decided together under this head. In one of them the jury, and in the other two the Court

without a jury, found as a matter of fact that the evidence did not show such authority, but WOODS, J. (on the appeal), says that (p. 39):

> "The inquiry of the takers of the draft drawn "by the president for his own purposes, however "made, was *whether* Cassatt had *authority* to draw "drafts of the bank upon funds of the bank in "the possession of its correspondents for use in "his *individual transactions.*"

And the possibility of the authority was recognized in the decision of the Circuit Court of Appeals on the appeal after the former trial in this case (104 Fed. Rep., 214), in which the Court say (p. 216):

> "The question turned, not upon an express au- "thority upon the part of Bush, but upon implied "*authority* which was to be *inferred* from the "alleged acquiescence of the Elmira Bank in his "*prior assumption of authority.* That, in the *ab-* "*sence* of any authority in a cashier to draw "cashier's *drafts to his own order*, in payment of "his individual debts, the person who receives "such a draft in payment of the cashier's individual "debt takes the *risk* of being obliged to repay "the draft to the bank was not denied."

At page 217 the Court say that the charge of the trial Judge that *such authority might be proved* by a course of previous transactions *was correct.*

In *Park Hotel Co. vs. Fourth Nat. Bk., 86 Fed. R., 742*, the Court say:

> (P. 744:) "Such a note (of the corporation to "the order of the president and signed by him) is "a *danger signal* which the discounter or purchaser "disregards at his peril. It is notice to him that, "if it is contested, he cannot recover upon it under "any *general* authority in the agent, or at all, "*unless* he proves that the agent was specially

" authorized to make that particular transaction,
" *or to make contracts of the corporation with*
" *himself.*"

(P. 746:) The form of the note gave the bank
" notice that Hogeboom had no power to make it
" under his *general authority*, and that, if the
" corporation contested it, it must discover and
" prove *special power* in him to do so."

If we waive the special considerations as to cashiers' drafts asserted in the Goshen Bank case, the result of the rule then is that, as a matter of construction of powers, one upon whom the burden is to prove the cashier's authority for a draft to his own order cannot rely simply upon a general authority to the cashier to draw bank drafts, or upon his general powers implied from his mere office as cashier; but he must in some way go farther and show that he has authority from the corporation or its board of directors to issue such drafts in his own matters.

## Mode of Proof of Power.

The cases cited above show that such a power may, like any other power, be proved, not necessarily by showing directly any express written or oral grant of power, but also by *circumstantial evidence*, such as the *exercise* of the power with the *acquiescence* of the principal.

Inasmuch as the rule is a rule of construction of the powers and not a rule of law that the principal *can* give the agent no such power, we take it that evidence of the exercise of the power by the agent may be effective in four separate ways.

*First.* The instances of the exercise of the power may have occurred to the knowledge of a party who relies on a subsequent exercise of the power, in which he may be protected by *estoppel*.

*Second.* Where there is a grant of a *general power*, the instances of the exercise of the power for the

agent's benefit may establish a *construction* of this power broader than that which otherwise the Court would give to it. In other words, the power being in its *terms* broad enough to cover the case of acts for the agent's benefit, the presumption that would otherwise obtain, that it was *not intended* to cover acts for the agent's benefit may be overcome by proof of acts done under the power, which show that it *was the intention* of the parties that the power should have a broad effect, according to its terms.

*Third.* The acts of exercise of the power are *evidence* from which the *jury may infer* that the power has been granted.

*Fourth.* The acquiescense of the corporation in the exercise of the power may *constitute* a grant of the power.

The jury has the right to consider the acts in exercise of the power with reference to their effectiveness in establishing any one of these four branches.

That a bank cashier has a general power to sign drafts is, of course, unquestioned.

Moreover, the by-laws of the Elmira Bank (Record, p. 63, provide) :

> " SECTION 25. All contracts, checks, *drafts*, &c.,
> " and all the receipts for notes received from
> " the Comptroller of the Currency shall be signed
> " by the *president or cashier*."

There was, therefore, a general power in the cashier of the Elmira Bank, both by reason of his office and by express provision of the by-laws, to sign drafts. The defendant, in addition, has shown a long-continued exercise by the cashier of the power to sign such drafts in his own favor.

The drafts actually proved are of varying amounts. Same of them are quite small, and this latter fact is

much insisted upon by the plaintiff. The size of the draft seems, however, to be immaterial. What we are confronted with and are asked to meet is simply the principle that a general authority will not be construed to allow *acts in the agent's own behalf.* That is the exception which the law construes into the grant of power. What we are obliged to show is that in the case of this cashier of the Elmira Bank *that exception did not prevail;* that acts done in his own behalf were *not excluded* from the scope of his authority. It is a question, *not of particular amounts,* but of *general principle* as to his authority; and the *principle* is established as soon as it is demonstated that such drafts of any size were issued by the cashier with the acquiescence of the Board of Directors. When it is established by instances of the exercise of the power that the right to act in his own case is not excluded from the authority of the cashier, how can the Court say that nevertheless he cannot act in his own case above certain figures? And how can it fix those figures? Is it reasonable to suppose that a board of directors would trust him to act in his own case but only up to some limit; and, if so, would they not expressly establish the limit on their records?

In *Colorado Springs Co. vs. American Pub. Co., 97 Fed. Rep., 843,* contracts amounting to over $200,000 for advertising were executed by the manager, and the question was raised of the manager's authority. He had no such authority by the by-laws or by virtue of his office. It was suggested that, as it was not shown that he had ever made contracts of *such importance or magnitude,* the evidence was insufficient to support a finding of his authority, but the Court says (p. 851):

> " We think, however, that it was *not essential*
> " to the submission of the cause to the *jury* that
> " the plaintiff company should have shown that
> " Parsons had theretofore executed contracts of
> " a precisely similar nature, involving the ex-
> " penditure of the same amount of money."

In *Leroy & Air Line R. R. Co. vs. Sidell, 66 Fed. Rep., 27, 31,* , this Court quotes with approval from *Bank vs. Norton, 1 Hill, 502*, as follows :

> " It is *not necessary*, in order to constitute a
> " general agent, that he should have done before
> " an act the *same* in specie with that in question.
> " If he has generally done things of the *same gen-*
> " *eral character and effect* with the assent of his
> " principal, that will be enough."

It is familiar law that the authority of an officer of a corporation to do an act need not be proved by the books of the corporation but may be proved by circumstantial evidence, such evidence being usually evidence of the exercise of the power with the acquiescence of the directors or officers.

*In Mining Co. vs. Anglo-California Bank*, 104 *U. S.*, 192, 194, 195, the Court say :

> " It is settled that the existence of such au-
> " thority in subordinate officers may in the ab-
> " sence of express statutory prohibition be shown
> " otherwise than by the official records of the pro-
> " ceedings of the Board. It may be established
> " by proof of the course of business between the
> " parties themselves, by the *usages and practice*
> " which the company may have permitted to grow
> " up in its business, and by the knowledge which
> " the board charged with the *duty* of controlling
> " and conducting the transactions and property
> " of the corporation had or *must be presumed* to
> " have had of the acts and doings of its subordi-
> " nates in and about the affairs of the corporation."

In *Bell vs. Hanover National Bank*, 57 *Fed.*, 821, 822, LACOMBE, J., citing this case, substantially repeats its language as follows :

> " Authority to make it (a contract) may be es-
> " tablished by proof of the course of business, by

" the usages and practices which the directors
" may have permitted to grow up in the business
" of the bank and by the knoweledge which the
" board of directors must be presumed to have
" had of the acts and doings of its subordinates
" in and about the affairs of the corporation."

In *Merchants' Bank vs. State Bank, 10 Wallace, 605*, the Court say, at page 644, that it

" should have been *left to the jury* to determine
" whether from the evidence as to the powers
" exercised by the cashier with the knowledge
" and acquiescence of the directors and the usage
" of other banks in the same State, it might not
" be fairly inferred that Smith had authority to
" bind the bank by the contract which he made."

And at page 649, as to the power of the cashier to certify:

" The questions whether the requisite authority
" was not inferable * * * should in this con-
" nection also have been *left to the jury*."

In *Martin vs. Webb*, 110 *U. S.*, 7, the Court say:

" It is clear that a banking corporation may be
" represented by its cashier * * * in trans-
" actions outside of his ordinary duties, without
" his authority to do so being in writing or ap-
" pearing upon the record of the proceedings of
" the Directors. His authority may be by parole
" and collected from circumstances. It may be
" inferred from the general manner in which for
" a period sufficiently long to establish a settled
" course of business, he has been allowed, with-
" out interference, to conduct the affairs of the
" bank. It may be implied from the conduct or
" acquiescence of the corporation, as represented
" by the Board of Directors. When, during a

"series of years, *or* in numerous business trans-
"actions, he has been permitted without objection
"and in his official capacity, to pursue a par-
"ticular course of conduct, it may be presumed,
"as between the bank and those who in good
"faith dealt with it upon the basis of his authority
"to represent the corporation, that he has acted
"in conformity with instructions received from
"those who have the right to control its opera-
"tions. Directors cannot in justice to those who
"deal with the bank, shut their eyes to what is
"going on around them."

In *Nat. Bk. of Commerce vs. Atkinson, 55 Fed. R., 465, 472*, it is said that authority to the president to make a note

"may be *conferred* upon him by the Board of
"Directors, either expressly, by resolution to that
"effect, by subsequent ratification, or by acquies-
"cence in other transacrions of a similar nature,
"and of which the directors have knowledge."

In *Chambers vs. Lancaster, 160 N. Y., 342, 349*, the Court say:

"The scope of the authority conferred by the
"corporation upon its president, Mr. Treanor,
"does not appear in terms, but his authority may
"be implied from the power he was accustomed
"to exercise without the dissent of the company
"and with its acquiescence."

That the defendant has proved that there was *no dissent* from the exercise of the power is, we understand, not questioned by the plaintiff. It was proved by direct and uncontradicted evidence of the cashier.

In proving the *exercise of the power* of the cashier to issue drafts in his own behalf, not only drafts drawn to his order, but *also drafts drawn to other persons but*

*in his own business* or for his own benefit or in his own individual matters, may be shown. Though not so strong *evidence of acquiescence*, because not so directly calling attention to the interest of the cashier, they are equally *acts of exercise of the power*. The limitation on the general authority is not merely a limitation of his right to draw drafts which are on their face to his own order, but extends to all acts in which he is an interested party. The limitation arises not out of the *form of the paper* but out of the *agent's interest*.

In *Anderson vs. Kissam, 35 Fed. Rep., 699*, WALLACE, J., said (p. 704):

> "It can make no difference whether the agent
> " or officer appears to be the party to whom the
> " paper is payable upon the face of the instru-
> " ment, or whether it appears by intrinsic facts
> " for whose benefit it was made. * * * As
> " the checks were made payable to the order of
> " the defendants for Warner's individual use, in
> " legal effect they were made payable to Warner's
> " own order."

In *Lamson vs. Beard, 94 Fed Rep., 30*, the drafts were not drawn to the order of the officer, but to the order of the parties to whom he made payments (p. 39).

The *knowledge of the officers* or directors may be proved by the *presumptions* of knowledge on the part of those charged with the management of the affairs of the bank and by *any circumstances tending to make it probable* that knowledge of such acts of exercise of the power came to the notice of the officers or directors.

See the cases above quoted.

In *First National Bank vs. Mining Co., 89 Fed. Rep. 439, 444*, the Court say:

> "It is so much the *duty* of such board to know
> " what its officers do that ignorance thereof cannot

" be urged as a justification for a failure to dis-
" affirm. *That like prior transactions have passed*
" *unchallenged justifies a presumption of authority*
" *in the officer making them.*"

In *Kissam vs. Anderson, 145 U. S., 435*, the Court say :

(P. 452) : " If it be said that no officer of the
" Albion Bank knew of these deposits except
" Warner, the wrongdoer, and that he subsequently
" drew out most of these moneys in drafts to
" further other wrongs, the reply is that the other
" officers of the Albion Bank were *chargeable*
" *with knowledge* of these deposits."

(Pp. 443, 444) : " The other directors also were
" under some obligation to know the affairs of
" the bank, and it will not do to say that the bank
" can ignore the negligence of all its officers and
" profit by their omission of duty. *At the least* it
" was a question to go to the *jury* whether the
" officers of the bank other than Warner, in the
" exercise of reasonable and proper care, *could*
" have ascertained that these moneys had been
" deposited to the account of the Albion " Bank."

In *Hanover Bank vs. American Dock & T. Co., 148 N. Y., 612*, where receipts for cotton were issued by the president in his own behalf, it appeared that he had signed *two* certificates in his own behalf in 1883 and *three* more in 1886, and that *one* of them was returned and placed among the vouchers of the company, and the jury might have found from the course of business that the others were also returned, and it might have found that successive deliveries were made on some of the receipts. The Court say (pp. 622, 623):

" *Thus* it would have appeared that Stone had
" openly assumed to issue certificates to himself for
" deposits of cotton *with no evidence that any*

" *objection* had been made by the directors or in " their behalf. *The number of times* that he did so " is mainly important in its bearing upon the " probability that the directors knew that he did " it *at all.* While it does not appear that they " actually knew of these transactions, it was a " *question of fact for the jury* to say whether " they ought not to have known under all the " circumstances, as their ignorance was no excuse " unless they were reasonably diligent in super- " vising the methods and details of conducting " the business under their charge" (quoting from Martin vs. Webb, 110 U. S., 7, 15).

And, again, at pages 623, 624:

The jury " might have been *satisfied that the* " *directors knew* that Stone was actually creating " obligations against the company in his own " favor, and that the directors '*gave him authority* " *by acquiescing in its exercise.*' While the evidence " is not conclusive, it tends to establish that fact, " and we think presented a question that should " have been *submitted to the jury.* They could " reasonably have believed from all the evidence " that these acts of Stone, and the authority " assumed by him, were approved by the company, " and that he, therefore, possessed *actual authority* " to issue certificates in his own favor."

## The Question is for the Jury.

The question of the authority on all the evidence is essentially a question for the jury. This is clearly asserted in a number of the cases above cited. It is distinctly recognized, both in *Anderson vs. Kissam* and in *Lamson vs. Beard.*

In *Colorado Springs Co. vs. Am. Pub. Co., 97 Fed.*

*Rep., 843, 849*, on a similar question of authority, it was said:

> "If there was substantial testimony tending to "substantiate the affirmative of this issue, then "*as a matter of course the case was properly sub-*"*mitted to the jury.*"

We have found no case, on any facts, in which it has been held that that question should not have been submitted to and decided by the jury, excepting the former appeal in this case.

The trial upon which the present appeal is based was held before Judge SHIPMAN, who wrote the opinion on the appeal to the Circuit Court of Appeals from the judgment on the first trial (104 Fed. Rep., 214). The case was tried with great care and thoughtfulness by him, with constant reference to the opinion on the former appeal. The question of the direction of a verdict for the $7,000 covered by the draft on the Quaker City Bank was taken under advisement by him on adjournment for the day and decided by him after mature deliberation the next day, when he decided that the matter should be left to the decision of the jury.

It is the settled law of the United States Courts that the *right* to have questions of fact submitted to the jury is one that should not be abridged; that in all cases of doubt, the *doubt should be resolved* in favor of submitting the question to the jury; and that it is only where there is no possibility within reason of any determination other than that which most commends itself to the Court that the question can be taken from the jury.

Nyback vs. Champagne Lumber Co., 90 Fed. R., 774, 776.
Richardson vs. Swift & Co., 96 Fed. R., 699, 700.
Cox vs. Robinson, 82 Fed. R., 277, 282-3.
Chicago, G. W. Ry. vs. Price, 97 Fed. R., 423, 428.

Ry. Officials Assn. vs. Wilson, 100 Fed. R., 368, 370.
Standard Ins. Co. vs. Thornton, 100 Fed. R., 582, 584.

It is the settled law of this Court that where the trial and Appellate Courts have concurred upon a question of fact the Court will accept their decision, except where *clear error* is shown.

Brainard vs. Buck, 184 U. S., 99, 105.
Busch vs. Jones, 184 U. S., 598, 604.

Respect is due to the decisions upon questions of fact of those judicial agencies constituted for the purpose of arriving at them.

Two juries on successive trials have considered the evidence in this matter and concluded that the cashier of the Elmira Bank did have authority to sign drafts in his own favor. Two Judges have considered that there was at least enough evidence to require the submission of this question to the jury. It is difficult under these circumstances to say that no reasonable man could find room for the decision which these juries have reached.

In *Lunt vs. London & N. W. Ry.* (*L. R., 1 Q. B.*, 277), BLACKBURN, J., says, at page 281:

> "When a *second jury* have affirmed a previous "verdict, the court never interferes except in a "very strong case, almost amounting to the mis-"carriage of justice."

And LUSH, J., says, at page 288:

> "Although I should have come to a different "conclusion, I agree that after *two juries* have "come to the same conclusion, we ought not to "send the case back for a third trial."

## Effect of Notice from Form of Draft.

Upon the most adverse authorities, the *only effect* which the fact that this draft was drawn to Bush's order or used in his business could have upon the Chase Bank was to give it *notice* of a "*possible want of authority*" and put it to the *danger*, but not the certainty, of such a want of authority and the risk of whatever the fact should actually prove to be with regard to the existence of such authority.

West St. Louis Bank vs. Shawnee Co. Bank, 95 U. S., *supra*, p. .
Beard vs. Milmine, 88 Fed. Rep., 868, 873.

This is fully recognized in *Anderson vs. Kissam, 35 Fed. Rep., 699*, where the question of authority was left to the jury (p. 702), and on appeal the Court said:

(P. 706:) "The evidence raised a presumption " of such knowledge and acquiescence on the part " of the directors, but did not show it conclusively. " It presented a question of fact for the considera- " tion of the jury, and the jury found, as the evi- " dence fully warranted them in doing, that the " directors were ignorant of Warner's acts."

" When he is informed that the agent who has " made the paper has made it in the name of the " principal for his own use, he must be prepared " to show that *special authority* in that behalf has " been delegated by the principal, and cannot " rely upon the implied authority of the agent " to make such paper in the ordinary business of " the principal.

(P. 707:) " It would have been proper to in- " struct the jury that the plaintiff was entitled " to a verdict if they found that Warner had no " authority actually or ostensibly."

It is also recognized in *Lamson vs. Beard, 94 Fed. Rep., 30*, where the Court on appeal throughout dis-

cuss the question *whether the fact* of such authority was proved.

It was also recognized on the first appeal in this case (104 Fed. Rep., 214), where the same question was submitted to the jury, and the *main question discussed* in the opinion on appeal was the question whether the facts proved justified the conclusion that such authority *actually existed.*

See, also, the cases generally herein cited on the proof of authority of an officer or agent to act in matters wherein he is interested.

## Evidence of Authority Given to Bush.

Bush himself testified on this subject as follows (pp. 37 to 42):

"Q. Mr. Bush, you *drew other drafts* as cashier of "the Elmira National Bank *to your own order* besides "the $7,000 Quaker City draft which has been mention-"ed, did you not?

"A. Yes, sir.

"I drew some that were made out to my own order. "I drew such drafts as cashier in my own case. I drew "some in my own case that were made to my own "order.

"Q. All of those drafts *regularly came back* to the "Elmira National Bank, did they not?

"A. Yes, sir.

"Q. And were *kept among its vouchers?*

"A. Yes, sir.

"Q. And, unless they were lost, they were handed over to the Receiver on the termination of the bank?

"A. Yes, sir.

"Q. They remained open to the inspection of the clerks and officers of your bank, did they not?

"A. They were there in the bank.

"Q. And *open to the inspection* of any director or officer who desired to examine them?

"A. Yes, sir.

"Q. In the case of some of these drafts you *gave your check* drawn against your account in the Elmira National Bank to pay for them, did you not?

"A. Yes, sir.

"Q. And these checks remained in the custody of the bank for a considerable period before they were delivered to you?

"A. Yes, sir.

"Q. Was there any attempt, in any of these drafts drawn to your own order, or otherwise, in your own business, to *conceal* the fact that you were drawing drafts as cashier in your own favor?

"A. No, sir.

"Q. Was *any objection ever made* to your drawing such drafts?

"A. No, sir.

"Q. Was *any objection ever made* to your drawing drafts in your own order?

"A. No, sir.

"Q. *How far back did* your practice of drawing such drafts in your own name extend?

"A. I would not be able to state, but I should judge *from the first time I wanted a draft.*

"Q. And from that time on *whenever you wanted* a draft in your business you drew it?

"A. Yes, sir.

"Q. *Just as you would for anybody else?*

"A. *Yes, sir.*

Eight drafts of the Elmira National Bank on the Chase National Bank, being drafts subsequently marked Exhibits Nos. 4–11, inclusive, were produced by plaintiff's counsel from among plaintiff's papers and shown to the witness.

"These eight drafts were all drafts signed by me as cashier and issued to me by the Elmira National Bank. They were all duly returned to the Elmira National Bank after payment by the bank on which they were drawn, in the regular course of business, and remained among the vouchers in the bank.

"Q. Was *any objection ever made* by any one to the issuing or using any of these drafts?

"A. Not that I ever heard of.

These eight drafts appear in full on pages 43 to 49 of the Record. They are all drawn to the order of J. J. Bush individually and are signed by J. J. Bush, cashier, and are drawn on the Chase Bank. They run in date from February 17, 1891 (Exhibit 7), to May 6, 1892 (Exhibit 11).

As to Exhibits Nos. 4, 5 and 6, which are indorsed either to the Chase Bank or to its cashier, he testifies that, to the best of his recollection, they were issued in paying interest on his note at the Chase Bank (pp. 42, 43, 44). He subsequently testified (p. 50) that he believed that Exhibit No. 9 was in some way used for the purposes of the Elmira Bank, and the jury were instructed by the Judge (p. 113) that this draft might be laid outof consideration; although it remained among the vouchers of the bank and was an element which should have tended to lead the officers to notice of the fact that Bush was signing drafts to his own order.

Three drafts on the National Bank of North America to the order of J. J. Bush and signed by J. J. Bush, cashier, were put in evidence and appear in full on pages 52 to 54, two of them being dated October 5, 1892, and one December 13, 1892, but the witness having testified (p. 54) that he believed that they were used for the benefit of the Elmira Bank in some Southern litigation, the jury was directed that they need not be considered (pp. 112 and 113); although these drafts also remained among the vouchers of the bank and were an item in bringing to the knowledge of the Board of Directors and officers the fact that Bush was signing drafts to his order. He *never told the officers* that these drafts were used in the business of the bank (p. 55).

A further draft (Exhibit No. 33) to the order of J. J. Bush, dated February 15, 1893, on the Chase Bank, was put in evidence and appears in full at page 56. It is endorsed to the order of the cashier of the Chase

Bank, and Bush testified (p. 56) that he believed that it was used to make a payment on account of his note at the Chase Bank.

At page 50 he testified :

" I recollect that I was making payments at short " intervals of interest on the loan at the Chase Bank. " I would use drafts on the Elmira National Bank to " make such payments. I used such drafts during that " period for that purpose."

A check drawn by Bush on the Elmira Bank, dated February 28, 1893, reading " Pay to the order of dft. " to order of M. L. Greider, $600," and a corresponding draft of the Elmira Bank on the Hide and Leather Bank to the order of M. L. Greider for $600, dated March 1, 1893, signed by J. J. Bush, cashier, were also put in evidence and appear as Exhibits 35 and 36 in full on page 57.

Bush testifiies, page 58 :

" I signed that check and signed the draft as cashier. " The check was given for the draft, the draft was " issued for the check. I paid it to Greider in my own " private business. It was returned to the Elmira " National Bank after payment in the regular course " of business and remained among the vouchers of the " bank as did the check."

A similar check " to the order of dft. to Mutual Life Ins. Co." for $500, drawn by Bush, and a corresponding draft on the Chase Bank to the order of the Mutual Life Insurance Company for $500, signed by Bush, as cashier, both dated March 31, 1893, were also put in evidence and appear in full as Exhibits 38 and 39, pages 58 and 59. Bush testified (p. 59) :

" I signed the check and signed the draft as cashier. " The check was given to the Elmira National Bank " for the draft and the draft was issued against it. The " check remained among the vouchers of the Elmira " National Bank. The draft was returned to us in the " regular course of business after payment and filed

" among the vouchers of the bank. I believe the check " was used by me in my private business."

A similar check by Bush on the Elmira Bank " to the order of dfts. on New York (Central Trust, $300; Chase, $77.50)," and two corresponding drafts on the Chase Bank, signed by J. J. Bush, cashier, one for $300 to the order of the Central Trust Company, and one for 77.50 to the order of the Chase Bank, all dated April 3, 1893, were also put in evidence, and appear as Exhibits 47, 48 and 3, on pages 60 and 61. Plaintiff admits that they were not issued for the purposes of the Elmira Bank (p. 62).

Bush further testified, pages 64, 65 :

" I have in my possession some checks drawn by " myself on the Elmira National Bank and returned " after payment of my vouchers. *Some* of my vouchers " were *not returned* to me, and I have not got them in " my possession.

" I have with me certain checks of mine so drawn on " the Elmira National Bank and returned to me. " Among them are *checks which, on their face, appear* " *to have been drawn for drafts* of the Elmira National " Bank. Among them are thirteen which are now " shown to me. These thirteen were all signed by me. " The 'Paid' stamp which is on all of them but one is " the stamp of the Elmira National Bank, and the cut " in the paper of the one that has not that stamp indi- " cates cancellation by the clerk by placing it on the " spindle. In the course of business, he would do that " at the same time that he drew the draft indicated by " the check.

" I believe I *received from the Elmira Bank the* " *drafts indicated by or corresponding to the descriptions* " *in these checks.* I don't know on what bank these " drafts were drawn, but I would believe that they were " drawn on the Chase National. There is nothing in " my recollection or in the drafts that would lead me " to believe that, except it is the absence of the name " of any other bank. When I drew a draft on any

" other bank, I entered the name of the bank on the " check, so far as checks drawn for my personal drafts " were concerned. I have every reason to believe that " I received the drafts drawn against these checks."

Plaintiff's counsel tried to discredit this testimony by further questioning, but the part of Bush's deposition which he read on this subject *preceded* (p. 69) the following which was Bush's *final* testimony thereon (pp. 68, 69):

" Q. You have exhibited nineteen checks drawn by " you on the Elmira National Bank to the order in " some form or other of drafts, all of which appear to " have been paid by the Elmira National Bank and " returned to you as vouchers. Is it possible, *from* " *your recollection*, that in so many cases as these " you did not receive the drafts called for by those " checks?

" A. *It is not possible.*

" Q. Is it possible that you did not receive them in " a large proportion of those cases?

" A. I do not believe so.

" Q. As a matter of fact, have you not a strong be- " lief that you did actually, in almost every one of " those cases, receive such a draft?

" A. It would *require the evidence of the books to con-* " *vince me* that I did not receive the drafts in *each one* " *of the cases.*

" Your conviction from your *knowledge of the trans-* " *action* is such that you feel very confident of it, is it " not?

" A. I believe that is what those checks were drawn " for.

" Q. And that they achieved the purpose for which " they were drawn?

" A. I do.

" Q. They were all your transactions?

" A. They were transactions connected with the " drafts.

" Q. If a check failed to bring the draft called for,

" you would be very apt to have some recollection of " it, would you not ?

" A. I believe so."

Among said checks are eight which were admitted in evidence, marked Exhibits Nos. 51, 54, 55, 56, 58, 59, 60 and 66, and appear in full on pages 66, 67, 73 and 74. They are all signed by J. J. Bush, and run in date from 2d April, 1891, to 6th June, 1892. The Exhibits Nos. 51, 54, 56 and 60 read: " Pay to the " order of dft. to J. J. Bush." Nos. 55, 58 and 59 read: " Pay to the order of dft. to order J. J. Bush," and No. 66 reads: " Pay to the order of dft. on New " York." Four of these eight checks (Exhibits 51, 58, 66 and 59) were drawn for the four drafts heretofore put in evidence, and marked, respectively, Exhibits 4, 6, 10 and 11 (p. 66). The drafts received upon the other four of these checks (Exhibits No. 54, 55, 56 and 60) are missing from the vouchers of the bank; but it is admitted by plaintiff that drafts were issued by the Elmira Bank at the dates and for the amounts of these checks respectively (p. 71).

Seven more checks drawn by J. J. Bush on the Elmira National Bank, being in terms drawn for drafts to his order and showing on their face that the drafts were drafts on Philadelphia banks, excepting Exhibit 57, which was for drafts on the Bank of North America, were put in evidence and marked Exhibits Nos. 50, 53, 57, 64 and 65, and appear in full on pages 72, 74, 80 and 95. They run in date from January 8, 1891, to October 5, 1892. Bush testified (pp. 67 to 69) that these were some of his checks drawn on the Elmira National Bank for drafts and returned by that bank to him among his vouchers, and that he confidently believed from his knowledge of the facts that he received drafts of that bank on the banks indicated in the checks for the amounts stated therein. None of these drafts have been found among the vouchers of the Elmira Bank, but it is admitted that drafts at the dates and for the amounts of Exhibits Nos. 50, 53 and 64 were issued by the Elmira National Bank (p. 71).

Bush having testified (p. 71) that the Philadelphia drafts issued on his checks were used in litigation for the benefit of the Elmira National Bank (p. 71), those checks (Exhibits Nos. 50, 53, 64 and 65) were directed by the Judge to be laid out of consideration by the jury (p. 113); although they constituted matter which should have assisted to bring to the attention of the officers of the bank the fact that Bush was signing drafts to his own order.

In addition to the drafts above mentioned, the entries in the draft book of the Elmira National Bank on the Chase National Bank show a draft for $30, to the order of J. J. Bush under date of February 11, 1893, and under date of January 4, 1893, a draft for $200, drawn to "F. & M. Spencer, for Bush" (p. 94).

The Elmira bank was organized in the Fall of 1889 (p. 34), and Bush became its cashier in January, 1890, and continued as cashier until the failure of the bank in May, 1893 (p. 35).

We thus have direct evidence of the cashier himself that from the *beginning* of his office, and during nearly the *whole existence* of the bank, he was in the habit of drawing and using such drafts for his own benefit and to his own order; that this was done *openly* and without concealment, and that *no objection* ever was made on the part of any of the officers of the bank to such action. We also have numerous specific instances, extending through most of this period, of the exercise of this power.

On the former trial the evidence only showed the existence of the practice during the last six months of the bank's existence. *The great extension of the period covered by the evidence on the last trial is a distinguishing fact of essential importance.*

The *drafts themselves* returning to the bank as vouchers were *notice* of this exercise of power, and the *checks* which Bush drew on the Elmira National Bank, and which *remained* for a considerable period with that bank (pp. 75, 76), were also on their face evi-

dence and notice of the fact that he was drawing drafts to his own order. Both checks and drafts were, of course, subject to inspection on entry or checking up.

There was a teller or assistant cashier in the bank (p. 36). C. E. Selover was the original president of the bank, and continued to be such until January, 1891, when Jackson Richardson succeeded him, and Richardson continued to be president until the close of the bank (pp. 35, 63–4). There is no evidence that these presidents were not active and attentive in the affairs of the bank. There were also several clerks permanently employed (p. 52). These checks of Bush, entered, of course, and remaining as vouchers in the bank, and these drafts returning to the bank from the correspondents on whom they were drawn as vouchers must necessarily have come under the supervision and inspection of other persons beside Bush and there is every probability therefore that they did come to the notice of the other officers or directors of the bank.

Bush testified (p. 56) that all drafts drawn were returned by the correspondent banks at the end of each month.

> "They were then compared by some one with "the records of the Elmira National Bank to see "if they tallied. I think the work was done by "any one of the clerks who happened to be the "least busy. Sometimes by Mr. Smith [the as-"sistant cashier], sometimes by clerks under "him."

In addition to the usual presumption obtaining that the officers and directors know the transactions of the corporation, we have in cases of national banks a force added to this presumption from the fact that by statute (U. S. Rev. Stat., Sec. 5147), it is especially required in national banks that

> "Every director, when appointed or elected, "shall take an *oath* that he will, so far as the

> " duty devolves on him, *diligently* and honestly " administer the affairs of such association "— which oath must be immediately filed with the Comptroller of the Currency.

The presumption of performance of their duties by officers of national banks is a strong one.

Finn vs. Brown, 142 U. S., 56, 69.

The attempt of the plaintiff to *meet by evidence* the general presumption of knowledge and the facts and circumstances which were shown to exist in this case certainly did not go to the point of conclusive establishment of lack of knowledge, *or make anything more than a disputed question*, and did not justify the withdrawal of this question from the jury. The evidence consists in negative statements as to what he did not see the examining committee or directors do (p. 76), made by Bush, who stated that when the committee were in the bank he was busy a good deal of the time, and did not see everything that they did, and did not see all the acts of the directors when looking over the bank matters; and also the testimony of Coykendall, who was the *only director or officer* other than Bush called by the plaintiff to give any evidence on this matter. He testified as to the limited action of himself and F. H. Richardson as members of the examining committee in performing their functions on that committee, and that *he personally* did not know what officer of the bank signed the drafts on other banks. The real substance of his testimony on this subject, however, is contained in the following (p. 85):

> " I did not know for a certainty who was sign- " ing cashier's drafts on our bank. I don't know " what the other directors individually knew about " that. So far as I was personally concerned, *I* " *left it to Mr. Bush's personal judgment and con-* " *trol* as to how he signed those drafts."

The other directors were mostly residents of Elmira

(p. 91), the place where the depositions of Bush and Coykendall were taken.

In the proof by *defendant* of specific instances of the exercise of power by the cashier, the difficulty of ascertaining the instances in which these powers were exercised is considerable. There seems to be no complete record among the Receiver's papers of drafts drawn on any but the Chase Bank. The record of the drafts drawn on the Chase Bank does not show to whose order those drafts were drawn prior to October, 1892 (p. 71). It appears that many of the *drafts* of the Elmira Bank *have disappeared* from among the vouchers and it is singular that among them are *several of the drafts for which Bush's checks were drawn* which have been given in evidence, and the issuance of which drafts affirmatively appears upon the books of the bank (see pp. 87–89, 90–92, 94). A comparison of the book of record of drafts on the Chase Bank with the drafts found among the vouchers of the bank produced by the plaintiff for the dates of October 1st and September 1, 1891, and January 2d, 1892, shows that by the record 21 drafts were drawn on October 1st, and only 19 could be found, that 18 drafts were drawn on September 1st, and only 14 could be found, and that on January 2d, 34 drafts were drawn and only 29 could be found, and among those missing were the drafts drawn on those dates against checks of Bush which were put in evidence. Again, in the attempt to ascertain from the checks of Bush what instances of the exercise of this power had occured, the checks which he produced were merely those drawn for drafts to his *own order*. It appears, however, that the checks which he did produce did not cover all of the drafts to his own order which were actually produced in evidence. It is probable, tharefore, that either his file of returned checks is incomplete or that his examination of the files was insufficient. In fact, it appears that his checks from November, 1902, to about the first of April, 1893, cannot be found (pp. 76, 86).

In addition to the circumstances already noted,

tending to support the conviction that the exercise of this power was conceded to Bush, is the fact that Bush himself, and Jackson Richardson the president, together with D. C. Robinson, were in fact the controlling persons in the management of the bank and that Bush's management of the affairs of the bank was rarely interfered with (pp. 35, 51) although an active supervision and examination of the affairs of the bank was maintained (p. 52).

*Under all of the circumstances, the submission of the question of authority to the jury was required, and such submission was not legal error.*

We may add, in answer to some claims of plaintiff, that by the form of the transaction of May 5th, no additional risk was imposed on the Elmira Bank in connection with a possible default of the Quaker City Bank. The draft was that of the Elmira Bank, and if the Chase Bank could take it at all it could hold the Elmira Bank on it on any default of the Quaker City Bank. Moreover, the draft was against the Elmira Bank's account at the Quaker City Bank, and any risk in the matter was a risk to that *account*, and the draft added nothing. Whether it was taken for "deposit" or for "collection" made no difference to the Elmira Bank.

## POINT XII.

**It is not beyond the power of a bank to authorize its cashier to issue drafts for his own use.**

Plaintiff contends that the grant of such authority *at all* is beyond the power of the corporation on grounds of *public policy*.

If the cashier had the power at all, then the Chase

Bank was not obliged to inquire into the question whether he had in fact paid, or otherwise provided consideration for the draft, on familiar principles of the law of agency. The person dealing with an agent is entitled to rely on the presumption of such facts.

Bank of Batavia vs. N. Y., L. E. & W. R. R., 106 N. Y., 195, 199.
Goshen Nat. Bk. vs. State, 141 N. Y., 379, 387.

Judicial rules of conduct, rights or powers, imposed on grounds of public policy are commonly known as "judicial legislation," and by careful courts are resorted to with reluctance, and only under compelling considerations of high importance. The suggestion of the imposition of such a rule not previously asserted in order that the party suggesting it may have a recovery, based on past transactions, which he could not otherwise have, invites jealous scrutiny.

Restrictions of corporate powers, based on considerations of public policy are properly within the sphere of the legislature. Judicial interference to impose such restrictions is to be zealously avoided.

The burden is on him who claims that an act is void as against public policy to make it *plainly and obviously clear* that it is so; and he must show something more definite and clear than simply a conviction of public *expediency*.

Vidal vs. Girard's Exrs., 2 How., 127, 197.
Hartford F. Ins. Co. vs. C. M & St. P. Ry., 70 Fed. Rep., 201, 207.

A cardinal ground of objection to so-called judicial legislation is that it is necessarily *ex post facto*.

In the case of the present claim, it would not only be that, but would be contrary to a well accepted view both of the public and of the Courts.

*All of the cases* which have been decided upon the subject of cashier's drafts have *fully recognized* the power to give the authority (see cases under Point XI.) and the Goshen Bank case, 141 N. Y., 379, goes so far

as to hold that on grounds of public convenience and the nature of the case *such a power should be assumed* to follow from the position of the cashier.

When a person has committed himself upon a contract or an accepted transfer, the transaction should not be treated as void for public policy unless that public policy is *so clear* that the person in engaging in the transaction *ought to have known* that it was against public policy. When the Courts have been passing on such cases and considering and sustaining the validity of such powers without discovering any such objection to them, it can hardly be said that there is an invalidity so clear and apparent that an ordinary individual ought to have known of it.

If it be now declared by the Courts that it is beyond the power of corporations to give such authority, then all of those persons who have *heretofore* received payments by cashiers' drafts used in the business of the cashier, no matter how fully the authority may have been given and with what completeness the takers may have informed themselves with regard to such authority, knowing that the Courts have repeatedly treated the question of the authority as a mere question of fact, those takers must refund the amounts so received by them.

In view of the decision in the Goshen Bank case, it is, in fact, difficult to treat with seriousness the claim that it is beyond the power of the bank to grant the authority which in that case it is declared ought to be assumed.

The ground on which the Court is asked to declare the grant of authority to be beyond the power of the corporation is that the power affords an *opportunity* for its misuse, and that the opportunity is a *temptation*.

Is the Court by limitations of the powers of cashiers to remove from them all opportunities which may constitute temptations to them toward wrong-doing? Is it to go on and do the same service in the case of all bank employees? Is it to be declared as a general legal principle that banks have no power to give to

cashiers, or to employees, powers or other opportunities which may prove temptations to them? This is beyond the limits of practical affairs. It is impossible to make a logical statement of any basis or principle at the foundation of plaintiff's claim which can be accepted as law.

In all the history of banks, and of the losses to them coming from the risks involved in their practical management, in which much dependence has to be placed on personal trust, how many cases of loss have come before the courts arising from the exercise of the power in question? And in those cases, how many of the guilty parties, with a willingness to defraud, would have failed to reach the same end in some other well-known way if this means had been denied them?

Confidence in its chief agents, and a corresponding treatment of them, may be a valuable thing to a bank, both for its internal effectiveness, and for its standing before the world; and it may not be well for it to show itself unwilling in its own business to trust them in such matters.

It does not seem, however, that plaintiff is in a position to raise the question here discussed, as he is claiming upon the draft and the deposit of it.

## POINT XIII.

**There was no reversible error in the admission of evidence.**

Almost all of the exceptions to the admission of evidence relate to evidence which operates *circumstantially* to sustain the conclusion that Bush had authority to issue drafts for his own benefit. If a fact or circumstance in any degree, though slight, tends to make

this conclusion probable, then it cannot be said to be *error* of the trial Judge to admit evidence of it, unless it signally tends to distract or mislead the jury.

As was said in *Holmes vs. Goldsmith, 147 U. S., 150, 164 :*

> " *Great latitude* is allowed in the reception of " *circumstantial* evidence, the aid of which is con- " stantly required, and, therefore, where direct evi- " dence of the fact is wanting, the more the jury " can see of the surrounding facts and circum- " stances the more correct their judgment is likely " to be. ' The competency of ' a collateral fact " to be used as the basis of legitimate argument is " ' not to be determined by the conclusiveness of " ' the inference it may afford in reference to " ' the alleged fact. *It is enough* if this *tend*, even " ' in as light degree, to elucidate the inquiry, or " ' to assist, though remotely, to a determination " ' probably founded in truth ' (Stephenson vs. " Stewart, 11 Penn. St., 307). The modern tend- " ency both of legislation and of the decisions of " courts is to give as wide a scope as possible to " the investigation of facts."

In *Continental Insurance Co. of Penn., 51 Fed. Rep., 884, 887*, the Court say :

> " Whenever the necessity arises for a resort to " circumstantial evidence, either from the nature " of the inquiry or the failure of the direct proof, " objections to testimony on the ground of ir- " relevancy are not favored, for the reason that " the force and effect of circumstantial facts " usually and almost necessarily depend upon " their connection with each other, and circum- " stances altogether inconclusive, if separately " considered, may, by their number and joint " operation, especially when corroborated by moral " coinci dences, be sufficient to constitute conclu- " sive proof."

In *Golden Reward Mining Co. vs. Buxton Mining Co., 97 Fed. Rep., 413, 416*, the Court say:

> "If testimony is relevant to an issue, it is gen-
> " erally admissible, and the Courts will not or-
> " dinarily consider its weight, but will leave that
> " question to be determined by the jury."

It is further to be borne in mind that where evidence is erroneously admitted, the admission is cured by proper instructions in the charge and the jury is to be presumed to have conformed to such instructions and to have made a verdict in accordance with the charge in that respect.

Pennsylvania Co. vs. Roy, 102 U. S., 451, 458, 459.
Lamson vs. Beard, 94 Fed. R., 30, 38.

Important instructions of this kind were given, especially some directing the jury not to consider certain drafts which were in evidence.

In considering the question whether in such a case of circumstantial evidence the Court has improperly admitted evidence to the consideration of the jury, it may become perhaps a question whether the *discretion* or judgment of the Court has been used *fairly* toward the plaintiff. It is therefore proper to call attention to the fact that various matters which, it will readily be seen, might have been highly important in assisting the jury to come to a conclusion favorable to the existence of the authority were *excluded* by the trial Judge.

Among other things, he refused to allow testimony of Bush as to drafts which he drew in his own business to the order of others than himself (pp. 40, 41); or testimony that the drafts to his order, and his checks for drafts, were always submitted to the inspection of other employees of the bank (pp. 40, 41); or testimony that other officers also drew drafts in their own favor (p. 42).

He refused to allow in evidence a series of 15 drafts,

running from May 4th, 1891, to March 3d, 1893, of amounts varying from $75 to $360, all to the order of as cashier, of the Chase Bank, and signed by Bush the cashier, and excluded all evidence as to their use, including evidence that they were used to pay *instalments of interest on Bush's note at the Chase Bank* (pp. 50, 51),

He also excluded two drafts drawn on the Chase Bank, signed by Bush as cashier, for $4,997.50 and $5,000, and all evidence as to their use (p. 51).

Plaintiff's objection to Porter's testimony as to the transaction of May 5th (p. 22, Assgmt. of Error I.) is frivolous. His whole case is based on this transaction. He himself puts in the statement of account (Exh. B) as evidence of deposits and a charge then made, and now attempts to forbid the defendant to give direct evidence of the actual facts. The things said and done by Bush, Porter and Voorhees on that day were the facts, the *res gestæ*, which fix the legal consequences. The direct testimony of the actors is the best evidence, and the objection that it was not the best evidence was not made (p. 22).

The evidence as to the actual control of the bank was of *some* value toward showing the situation and the likelihood of authority being conceded to Bush and of the activity of the oversight of Richardson, the president, but it was not important nor made extended or prominent.

The evidence as to overdrafts was also insignificant, but such effect as it could have to strengthen the probability of a grant of power to make drafts by the fact of exercise of the similar power of overdrawing openly appearing on the books is not illegitimate or erroneous when taken in connection with the direct evidence of the continued issue of drafts.

Of course, the admission in evidence of small drafts, in connection with the evidence of larger ones, was not erroneous.

The admission of drafts drawn to the order

of other persons, in connection with Bush's checks showing on their face that they were given for these drafts was not erroneous. The drafts alone are evidence of one item necessary to the proof of authority—that is, the exercise of the power (see above, Point XI.), and they are accompanied by checks, which tended to give notice that they were drawn in Bush's business. Those admitted on this trial were admitted also on the former trial and were referred to in the opinion on appeal as tending to support the authority. The checks accompanying those drafts were all produced at the trial from the *plaintiff's* possession.

The answer of Bush objected to (Assnt. XXVI.) is of no consequence, and there is nothing tending to support the assertion that it is "hear-say."

## POINT XIV.

**There was no reversible error in the charge or the refusal of requests to charge.**

"The refusal of these requests to charge could not "have *prejudiced* it, and, therefore, the exceptions "based thereon are immaterial, and could not require "us to set aside the verdict."

N. Y., N. H. & H. R. R. vs. O'Leary, 93 Fed. R., 737, 740.

A charge to a jury is not to be subjected to minute criticism when it is not, taken as a whole, misleading.

Baltimore & Potomac R. R. vs. Mackey, 157 U. S., 72, 86, 87.

"The instructions given by the Court at the trial are "entitled to a reasonable interpretation."

Chicago G. W. Ry. Co. vs. Healey, 86 Fed. Rep., 245, 250.

Though certain language in a charge may be misleading if taken by itself, it is not error if it is not so misleading if taken with the proper context.

North. Pac. R. R. vs. Babcock, 154 U. S., 190, 201.

It is settled that in the United States Courts the Judge in charging the jury may express his opinion on the facts, if ultimately all matters of fact are left to the jury; and the power of the Court in this respect is not controlled by State statutes or practice.

Vicksburg R. R. Co. vs. Putnam, 118 U. S., 545, 553.

Simmons vs. U. S., 142 U. S., 148, 155.

The charge of the Judge was, on the whole, eminently fair to the plaintiff. It was particularly so on the principal question of the proof of authority. Certainly the result of the trial will not be set aside on account of any unimportant ruling or slight departure from mathematical correctness of statement, if any shall appear.

Most of the assignments of error relate to the main questions of the case, covered by the previous points.

A number of them we find it difficult to connect properly with matters in the charge and exceptions.

As to the requests to charge that the jury "are not to take into consideration" the two checks for $306.67 (Assgnts. 46, 47): These are Exhibits 55, 56 (p. 73). They are, on their face for drafts to Bush's own order. They are to be considered in connection with Bush's testimony (pp. 64–5, 69) that corresponding bank drafts were issued on them. As to the objection that it does not appear that Bush signed the drafts: The only officers authorized by the by-laws to sign drafts were the president and cashier (p. 62); and Richardson, who was president from March, 1891 (pp. 63, 35), never so far as Bush knows, signed a draft (p. 36). The only other authority given to any officer to sign was only to sign in Bush's *absence* (p. 63). It was the custom at this bank to date transactions after business

hours as of the next business day (pp. 96–7). Even if it appeared that *some* drafts on the date of those issued on these checks were signed by the assistant, Bush was present and signing during part, at least, of the day; and, as the drafts were drawn on his own checks, the probability that he was present in the part of the day in which they were drawn is so strong that it was certainly within the scope of the power of the jury—especially in view of the peculiar absence of the draft from among the plaintiff's files—to accept it, and within the power of the Court, in connection with the direct evidence of the issue of similar drafts, to allow these circumstances to be submitted to the jury.

As to the request to charge (Assgnt., 42):

" The jury are not bound to believe Porter's testi-
" mony upon any point not conceded by the plaintiff,
" even where the testimony is uncontradicted."

Porter ceased to be an officer or employee of the defendant nearly two years before the trial. His testimony as to most matters was fully corroborated. At the same time the Judge did, in effect, clearly leave it to the jury to disbelieve Porter's testimony. For instance, Porter testified absolutely to his good faith and want of notice, and yet the jury was distinctly charged to find upon it.

In the case of *Canajoharie Bk. vs. Diefendorf, 123 N. Y., 191*, cited by plaintiff on the argument below, the witness was at the time of trial not only cashier, but also a stockholder, and the ruling was only that it was not error for the Court to refuse to *take the case away from the jury*, who did disbelieve and find against the evidence of the cashier.

There is no such absolute rule is is claimed by plaintiff, and it may well be proper and allowable for the Court *even to direct a verdict* upon the testimony of a witness actually interested at the time of the trial.

Hull vs. Littauer, 162 N. Y., 569, 572.
Anderson vs. Boyer, 156 N. Y., 93, 99.

At all events the instruction in the form requested was certainly improper. It is entirely too broad. It

applies equally to all testimony whether supported by inherent probability or direct corroboration or not, and it does not suggest to the jury the ground upon which they might disbelieve, or which they had a right to consider in determining whether to believe. Such a bald and sweeping instruction in this case would have been improper and likely unduly to discredit the testimony and mislead the jury.

It is not error to refuse a charge which is in too broad terms and likely to mislead.

Fidelity and Deposit Co. vs Courtney, 186 U. S., 342, 364.

As to the objection to the charge as to burden of proof of bad faith, this charge related directly to the cash ; it is not clear that it related to the draft. It seems also to be directed to the subject of affirmative bad faith or " actual fraud " rather than technical good faith such as arises from " notice." All the arguments or suggestions on the subject of bad faith were fully called to the attention of the jury by the charge, and certainly with sufficient emphasis on those in favor of the plaintiff.

So far as the cash is concerned, even if the defendant were suing, there is no such burden on persons receiving cash as plaintiff claims. The rules, arising from public convenience, relating to such payments do not permit of it.

Southwick vs. First Nat. Bk., 84 N. Y., 420, 434.
Stephens vs. Board, 79 N. Y., 183, 187.
Justh vs. Nat. Bk., 56 N. Y., 478, 434.
Goshen Bk. vs. State, 141 N. Y., 379, 385.
Nassau Bk. vs. Nat. Bk., 159 N. Y., 456, 460.
Holly vs. Missionary Soc., 180 U. S., 284, 293-4.

The question of good faith is, of course, involved in the sense that, if *bad faith* is shown, the taker cannot retain the cash, and that is covered by the Judge's

charge. Plaintiff cites no case on the subject of the cash.

As to the draft, the Court proceeded to charge clearly and directly that the defendant took *with notice and at its risk* as to any lack of the cashier's power to draw the draft, and not only that, but that the jury should "*require clear proof*" (p. 114) of his power, so that the burden of the only question of good faith disclosed by the case as to this draft is placed on defendant.

But plaintiff's objection is not sound on general principles. The cases which he cites are ones in which the *holder* of commercial paper was *suing* on it, and necessarily had the burden of the issues. What is often spoken of as the burdens and shifting burdens of proof in cases of commercial paper are in fact, nothing but what is sometimes called the "burden of going ahead," and producing *some* proof, arising from certain technical presumptions or overcoming of presumptions on certain definite facts, but have nothing to do with the *burden of proof* to be considered by the jury at the end of the trial, and in disposing of which they consider these presumptions.

The issues in this case were made by denials of the plaintiff's allegations, and the burden of the issues is upon him, and remains with him throughout the trial. It never shifts.

Whitlatch vs. Fidelity & Cas. Co., 149 N. Y., 45, 50.
Farmers' L. & T. Co. vs. Siefka, 144 N. Y., 354, 358.
Merzbach vs. Mayor, 163 N. Y., 16, 20–1.
Kay vs. Met. St. Ry., 163 N. Y., 447, 453.

"There is confusion sometimes in treating of the "burden of proof, arising out of unexact defini- "tions. The burden is upon a plaintiff to establish his "cause of action when it is in proper form denied by "the other party. * * * It is very common to say "in such cases that the burden is upon the defendant "to establish the fact relied upon. All that this can "properly mean is that when the plaintiff has estab- "lished a *prima facie* case, the defendant is bound to

" controvert it by evidence, otherwise he will be cast in
" judgment. When such evidence is given, and the
" case upon the whole evidence, that for and that
" against the fact asserted by the plaintiff, is submitted
" to court or jury, then the question of the burden of
" proof as to any fact, in its proper sense, arises, and
" rests upon the party upon whom it was at the outset,
" and is not shifted by the course of the trial, and the
" jury may be properly instructed that all material is-
" sues tendered by the plaintiff must be established by
" him by a preponderance of evidence."

Farmers' L. & T. Co. vs. Siefka, *supra.*

## POINT XV.

### The cases relating to the Bank of Perth Amboy do not assist the plaintiff.

The case of Campbell vs. Upton (66 N. Y. App. Div., 434) sustains the Cashier's draft, both upon the general propositions stated in Goshen Bank case as to cashiers' drafts and also upon the proved authority of the cashier, as shown by his acts, in issuing drafts.

In the case of Campbell vs. National Broadway Bank, in the Circuit Court for the Southern District of New York, the charge is favorable to the drafts, and at least leaves the question open as a question of fact to the jury.

In the case of Campbell vs. Manufacturers' National Bank, in the Court of Errors and Appeals of New Jersey (51 Atl. Rep., 497), the Court appear to consider all of the cases in which prior issue of drafts was shown to have been cases in which the directors knew of and approved the particular drafts before their issue and took security therefor. The Court say:

" It would have been an entirely different situ-
" ation if he had been in the habit of drawing

" similar drafts against the bank's funds for his
" individual purposes before consulting the presi-
" dent or the directors and they had known of or
" subsequently approved such acts. That would
" have been a case within the principle ruled in
" Goshen Bank vs. the State of New York."

And again:

" That which was discernible by inspection upon
" the face of the draft or record, and which needs
" no investigation to show it to be out of the ordi-
" nary, and, therefore, speaks for itself, will no
" doubt raise an implied or constructive ratification
" if seen by officers or directors; and failure to ex-
" ercise ordinary care in checking off vouchers or
" inspecting records by bank officials, will no doubt
" also raise such a ratification, if it appears that if
" they had so examined the same a simple inspec-
" tion thereof would have shown the facts."

Notwithstanding the view of the facts which is suggested by the opinion of the majority, *six judges* dissented from the conclusion of the Court, DIXON, J., the only one writing an opinion, stating his opinion that the question should have gone to the jury.

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# Supreme Court of the United States.

No. 105.—October Term, 1902.

George C. Rankin, as Receiver of the Elmira National Bank, Plaintiff in Error, vs. The Chase National Bank. | In error to the United States Circuit Court of Appeals for the Second Circuit.

[February 23, 1903.]

On the 23d day of May, 1893, the Elmira National Bank of Elmira, New York, failed, and a receiver was shortly thereafter appointed. At the date of the failure, on the face of the ledger of the Chase National Bank of New York city, there was a balance to the credit of the Elmira bank which was paid with interest at six per cent, as previously agreed on. The Receiver, at the time of this payment, asserted that he was entitled to a larger sum. This being disputed by the Chase bank, the present suit was brought. In substance the cause of action was based upon the averment that the Chase bank had wrongfully charged the account of the Elmira bank with a check for $15,012.50. The answer, whilst admitting the charging of the check, asserted its validity. In addition it was averred that, even although the check had not been legally charged, the Elmira bank was not entitled to recover, because at the time the check was debited to its account, and as a result of such charge two credit items, one of $8,000 and the other of $7,000, had been put to the account of the Elmira bank, to which it otherwise would not have been entitled, and hence the check had been counterbalanced by the credits in question. There was verdict and judgment in favor of the Chase bank, and the case was taken by the Elmira bank to the Circuit Court of Appeals. That court decided that the trial court had correctly instructed the jury that the check for $15,012.50 was void, and therefore had been illegally debited to the Elmira bank. The court, moreover, held that the court below was right in instructing that the two credit items, referred to in the answer, could be retained by the Chase bank if the sum thereof belonged to that bank which, had given credit to Elmira for the amount, solely as a counter entry to the charge of the check for $15,012.50. The judgment was, however, reversed, and a new trial ordered, because it was concluded there was no proof from which the jury could have inferred that the Chase bank had a right to retain the $7,000 item. (104 Fed. Rep. 214.) On the new trial the case made was as follows:

J. J. Bush, who was the cashier of the Elmira bank, borrowed for his individual account from the Chase bank a sum of money, and his debt, evidenced by his demand note, secured by stock of the Elmira bank as collateral, amounted, on the 4th of May, 1893, in principal and interest, to a sum slightly exceeding fifteen thousand dollars. On that day Porter, the vice president of the Chase bank, through the long distance telephone, called Bush at Elmira, and requested that he either pay his debt or furnish additional security. Bush replied that he would come to New York city on the next morning and settle the matter. On the morning of the 5th of May he appeared at the office of the Chase bank and offered to Porter, the vice president, $8,000 in cash and a draft for $7,000, signed by Bush as cashier of the Elmira bank, drawn on the Quaker City National Bank of Philadelphia. The vice president stated to Bush that the draft on Philadelphia was not equivalent to cash, because of the disturbed financial condition prevailing in Philadelphia, and hence declined to receive the draft in payment of the note. It was thereupon agreed that Bush would give his individual check on the Elmira bank for the principal and interest of his debt; that this check should be by him certified and made payable at the Chase bank; that the cash offered should be received, and that the check and cash should be at once put, respectively, to the debit and credit of the account of the Elmira bank. It was also understood that the draft on Philadelphia should be taken, and when collected its proceeds should be credited to the Elmira account. Thereupon a check was drawn by Bush individually on the Elmira bank. Across the face of this check the following was written:

"Certified and accepted May 5, 1893. Payable at Chase National Bank, New York.

ELMIRA NATIONAL BANK,
By J. J. BUSH, *Cashier.*"

There was conflict in the testimony as to whether the $7,000 draft on Philadelphia, signed by Bush as cashier, was when first offered by him, payable to his individual order or to his order as cashier. The officer of the Chase bank testified that when the draft was first offered it was payable to Bush's individual order, and that it was subsequently changed so as to make it payable to the order of Bush as cashier, to carry out the settlement agreed upon. There was no conflict, however, in the proof, showing that the draft on Philadelphia, as actually handed to the Chase bank, was drawn by Bush as cashier of the Elmira bank to his own order as such cashier, and was endorsed by him as cashier for deposit in the Chase bank. The $8,000 in cash, having been received from Bush, was at once credited to the account of the Elmira bank, and also at once the account of that bank was debited with Bush's individual and certified check for the $15,012.50. As the account of the Elmira bank had to its credit

a sum more than sufficient to pay the check it resulted, upon the assumption of the legality and good faith of the Chase bank in charging the check, that it at once received the full amount of the debt due it by Bush. The draft on Philadelphia was forwarded for collection and was thereafter paid, and the proceeds put to the credit of the account of the Elmira bank. It was shown that on the 5th of May, when Bush drew and certified his individual check on the Elmira bank for $15,012.50, his deposit account with that bank was overdrawn. It was shown that at various times, covering a considerable period, Bush had drawn as cashier of the Elmira bank a number of checks for a small amount, each to his individual order, and had used such checks to pay his personal debts, and there was also proof tending to show that the officers and directors of the Elmira bank knew, or had reason to know, that such checks had been drawn by the cashier. Other checks were also offered, from which it was contended the inference of implied authority could be legitimately drawn. It was shown that the Elmira bank had no knowledge of the drawing of the check of $15,012.50, and the fact that such check had been charged by the Chase bank to its account was only learned after the failure of the Elmira bank, when the Chase bank rendered its account to the receiver. It was also shown that Bush, the cashier, had, on the evening of the 4th or the morning of the 5th of May taken the $8,000 of cash which he paid to the Chase bank from the funds of the Elmira bank.

The court instructed the jury that the check for $15,012.50 was void as to the Elmira bank, "because it was the certification of the cashier's individual check, given and received for his individual benefit, with no authority either to certify or to make it payable elsewhere than at the office of the Elmira National Bank. . . . There is no evidence tending to show that Bush had any real or apparent authority for this certification or to make the check payable at the office of the defendant. . . . The certification by a cashier of his own individual check is void, irrespective of the question whether he had funds in the bank to meet it, for he could not act in regard to the same check in two capacities, both as drawer and as endorser, to bind the bank for its payment."

To this instruction of the court no exception was reserved by the defendant. Having thus eliminated the check of $15,012.50 from the account, the court said:

"The importance of this case turns upon another set of facts, to which I will now call your attention. You will see that Bush, as cashier, certified his own individual check for $15,012.50, and that he left the currency, $8,000, and the Quaker City draft for $7,000. Consequently, whatever is to be found about the liability of the defendant to repay $15,000, there is no question that it is liable to repay $12.50 and interest from May 5, 1893, and your verdict will be for the plaintiff for that sum at least."

To this charge also no exception was reserved by the defendant. The court then proceeded:

"The questions in the case beyond the $12.50 are in regard to the right of the Chase National Bank to retain the $8,000 in currency and the $7,000 draft. You will see that, with the exception of this $12.50, I put the case as though when Bush came in with his bag containing $8,000 in currency and $7,000 in a draft, those two, the currency and the draft, had been received by Porter and credited upon the note, and this form, this illegal, improper form of taking Bush's individual check and having it certified by himself as cashier, had not been gone into. The questions in the case beyond the $12.50 are in regard to the right of the Chase National Bank to retain the $8,000 in currency and the $7,000 draft. Now, this money, this currency, was without question taken by Bush from the vaults of the Elmira bank without authority, and was its property, but inasmuch as it was currency or money, bank bills, if it was received by the defendant in good faith, in due course of business and for the payment of a valid debt, the defendant is not subjected to the risk of repayment to the person from whom it was illegally obtained."

Coming to consider the draft for $7,000, the court first called the attention of the jury to the fact that there was some dispute in the testimony as to whether this draft, when originally offered by Bush to the Chase bank in part payment of his debt, was drawn to his individual order or to his order as cashier, but expressed an opinion that it was satisfactorily established by the testimony adduced by the Chase bank that the draft, when first offered to that bank, was drawn to Bush's individual order, and that the adding of the word cashier after the name of Bush, so as to make it payable to him as cashier, was subsequently done, and that such also was the case as to the endorsement on the draft making it payable for deposit in the Chase National Bank to the credit of Bush, cashier, that is, of the Elmira bank. The court, however, instructed the jury that in any event the addition of the word cashier upon the face of the draft and the endorsement put upon it was of no importance except as a mere element of proof on the subject of the good faith of the Chase bank in having received the money and draft from Bush. Thus treating the fact that the draft was signed by Bush as cashier, and was payable to his order as cashier for deposit in the Chase bank to the credit of the Elmira bank, as irrelevant, except on the question of good faith, the court came to consider whether the Chase bank was entitled to retain the proceeds of the draft. The jury were instructed that "in the absence of any authority in the cashier to draw cashier's drafts to his own order in payment of his individual debts, the person who receives such a draft in payment of a cashier's individual debt takes the risk of being obliged to pay the draft to the bank. . . . The general authority of the cashier to draw drafts or checks on the bank in the conduct of its business does not, by itself, permit him to draw such drafts or checks in payment of his personal debts or to raise money for the transaction of his personal busi-

ness. When, therefore, he draws a draft or a check on the bank payable to his own order, and for his own individual debt, the party acting thereon takes the risk that he may act without authority to do so."

The jury, however, were instructed that either express or implied authority might have been conferred to draw such drafts, but that, as there was no proof tending to show express authority, it could only be found by implication. The source from which such implication might be derived from the proof before it was stated to the jury is as follows:

"The authority of a cashier may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of a corporation as represented by its board of directors. When during a series of years and in numerous business transactions he has been permitted without objection, and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between his bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operation. His authority is to be implied from the acquiescence of the directors in permitting an officer, during a series of years, to pursue a particular course of conduct, and this acquiescence is derived from their actual knowledge, or from what should have been their knowledge of the conduct, of the course of business of the officers."

Commenting at length upon the testimony showing the drawing of checks by Bush as cashier to his individual order, and pointing out the fact that the proof on the subject was different and stronger than had been the proof in the case when previously tried, the question of fact as to the existence of the course of business authorizing the inference of authority in Bush, was submitted to the jury. Exceptions were reserved by the receiver to the foregoing rulings, as well as to the refusal of the court to give instructions which were asked, embodying asserted principles of law which were directly antagonistic to those charged by the court to the jury. There was verdict and judgment against the Chase bank for $12.50 with interest, and the case was taken again to the Circuit Court of Appeals. That court, considering that all the legal controversies in the case had been settled by its previous opinion, and that the additional evidence on the subject, of course of business, was sufficient to support the verdict as to the proceeds of the draft for $7,000, affirmed the judgment, for the reasons just mentioned, which were stated in a *per curiam* opinion.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

1st. The illegality of the check for $15,012.50 and the wrong resulting from charging it to the account of the Elmira bank is not open to con-

troversy. The ruling to that effect on the first trial seems to have been acquiesced in by the Chase bank, since it prosecuted no writ of error, and this is also true of the case now before us. Besides, no exception was saved by the Chase bank at the trial now under review to the instruction of the court concerning the illegality of the check and its insufficiency as a charge against the funds of the Elmira bank on deposit with the Chase bank. That question may be therefore put out of view.

2d. The errors assigned by the Receiver of the Elmira bank concerning the right of the Chase bank to retain the $8,000 paid it in cash are also in substance not open to inquiry because of the verdict of the jury. Whether the $8,000 in currency was actually received by the Chase bank from Bush in good faith in part payment of his note was left by the court to the jury under adequate instructions, and these issues of fact are therefore foreclosed by the verdict in favor of the Chase bank. It follows that the $8,000 when deposited was the money of the Chase bank, received by it in part payment of a debt. This leaves open only the question whether one, who has in good faith received currency in payment of an existing debt, can be compelled to repay such currency because it subsequently develops that the currency paid had been embezzled by the one who made the payment. That under such conditions repayment cannot be exacted is elementary and is not disputed. It is equally clear, we think, that the court correctly charged the jury that the burden of showing fraud on the part of the Chase bank was on the receiver.

3d. Conceding, without so deciding, the correctness of the ruling of the court below as to the right to imply authority on the part of the cashier to draw a draft in his official capacity in his individual favor from the course of previous business, we fail to perceive its relevancy to the case before us. The draft for $7,000, which was collected by the Chase bank, was not drawn by the cashier to his individual order, but was drawn by him as cashier to his order as cashier, and was endorsed for deposit to his credit as cashier. It was therefore but an order transferring the funds of the Elmira bank, which were on deposit in the Philadelphia bank, to the deposit account of the Elmira bank with the Chase bank. True it is that Bush, from one view of the testimony, first tendered a draft signed by himself as cashier to his individual order; but such draft was not taken by the Chase bank. It may be, if the principles of authority implied from a course of business as announced by the lower court, be sound, and if the facts brought this case within such a rule, if the Chase bank had taken the cashier's draft to his individual order, it could have retained the money. We are not however called upon to pass upon the rights of the parties upon the basis of what might have been done, but alone upon what was done. We may not indulge in conjecture, but must dispose of the case as depending upon the real, not the imaginary transaction. Measuring

the rights of the parties by this rule, we see no escape from the conclusion that the money collected by the Chase bank for account of the Elmira bank was obviously the property of the latter. The draft on Philadelphia was refused because of the delay which it was feared would attend its collection. The certified check was taken. It was for the entire debt, principal and interest. It was at once charged. The sum to the credit of the account of the Elmira bank when the check was charged was more than sufficient to pay it. Upon the theory of the good faith of the transaction, on the part of the Chase bank, its debt was paid, and it could have no possible interest in the proceeds of the collection of the draft. Of course, on the theory that the Chase bank was suspicious of the legality of the certified check and of its right to debit the Elmira bank with it, the purpose to retain a right in the proceeds of the draft would be in reason conceivable. But to indulge in this hypothesis would be to assume the existence of bad faith, and hence to defeat the right to the proceeds of the draft and of the money as well.

It follows that there was error committed in the instructions as to the right of the Chase bank to retain the $7,000 collected by it from the proceeds of the draft in favor of the Elmira bank, *and the judgment of the Circuit Court of Appeals is therefore reversed and the case remanded to the Circuit Court with directions to set aside the verdict and grant a new trial.*

True copy.

Test:

*Clerk Supreme Court, U. S.*